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Supreme Court, U.S.
FILED
APR 19 1993
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN C. JUSTICE and STEVEN T. LYNCH,

Petitioners,

vs.

Lt. JERRY SUITS, JUDSON CHILDS, Assistant Warden of Shawnee Correctional Center, Pfc. D.R. FRIEDMAN, DAVID G. SANDAHL, Warden of Shawnee Correctional Center, GARY RICH, Internal Affairs Officer of Shawnee Correctional Center, MICHAEL P. LANE, Director of the Illinois Department of Corrections, KENNETH L. McGINNIS, Successor to Michael P. Lane as Director of the Illinois Department of Corrections, and UNKNOWN EMPLOYEES OF SHAWNEE CORRECTIONAL CENTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI

John C. Justice, *in propria persona*
1801 S. 55th Avenue
Cicero, Illinois 60650
708-656-3250

260PP

APPENDIX

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ILLINOIS
DEPARTMENT MICHAEL P. LANE
OF Director
CORRECTIONS
Shawnee Correctional Center / P. O. Box 400, HWY. 146E Vienna, IL 62995 Telephone (618) 658-8331

M E M O R A N D U M

TO: Inmates/Inmate Family Members

FROM: David G. Sandahl, Warden
Shawnee Correctional Center

SUBJECT: P I C N I C G U I D E L I N E S - INMATE/FAMILY PICNIC

The following guidelines for visitors will be in effect for the Inmate/Family Picnic:

1. Proper I.D.'s will be required for all visitors. Visitors must leave jewelry, purses, billfolds, and money in their vehicles. Visitors will be escorted to the picnic area beginning at 8:00 a.m.

2. Food and drinks for the picnic are furnished. Visitors are not permitted to bring food or drinks into the institution.

3. Toilet facilities will be provided on the yard. Signs will be posted on the restrooms accordingly (female visitors, male visitors, inmates).

4. Cigarettes, ice cream, popcorn, pizza, potato chips, and soda will be sold at the yard commissary during picnic time. A photographer will also be available to take pictures. Visitors will be allowed to purchase both commissary (maximum of $30) and photograph coupons prior to entering the Institution, at a location in front of the Gatehouse. Visitors will not be allowed to bring any money into the institution.

5. No cigarettes, matches, or lighters will be allowed inside the institution.

Cigarettes and matches will be available for purchase at the yard commissary. Also, visitors will not be permitted to wear any jewelry to the picnic.

6. At 1:45 p.m., all visitors will be notified that the picnic will conclude in 15 minutes. All picnic visits will be terminated at 2:00 p.m.

7. At 7:00 p.m., all visitors will be escorted to the Administration Building. Inmates will not be permitted to escort their visitors to the Administration Building. Processing for regular visits will be terminated from 2:00 p.m. - 3:30 p.m.

8. The picnic area will be clearly marked and visitors are expected to strictly respect these boundaries.

9. It is suggested that, if you wish to buy commissary and/or photograph coupons, you lock your car, go buy the coupons you wish to purchase at the table

marked "Commissary Coupons", return to your car to leave your money, jewelry, etc., then lock your car and report to the Registration Desk in front of the Gatehouse.

Your cooperation is appreciated.

(SIGNED)

David G. Sandahl, Warden

Shawnee Correctional Center

DGS:KC:lc

cc: All Picnic Visitors

I L L I N O I S
DEPARTMENT
OF
CORRECTIONS

KENNETH L. McGINNIS
Director

Shawnee Correctional Center P. O. Box 400, HWY. 146E / Vienna, IL 62995 / Telephone (618) 658-8331

June 27, 1990

John C. Justice
1801 South 55th Street
Cicero, IL 60650

RE: White/Male DOB: 10/22/32
SS#: 238-44-1722
Drivers Licenses #: J232-4633-2301

Dear Mr. Justice:

Please be advised that you have been placed on the Permanent Restriction List for visiting at the Shawnee Correctional Center as well as all correctional facilities within the Adult Division of the Department of Corrections. This restriction began on June 16, 1990.

This restriction is a result of your second violation of Departmental Rules in that you refused permission for staff to search your vehicle on May 13, 1990 and June 16, 1990. I am also advising you that you may request a review of this restriction after a six-month period.

Sincerely,

(SIGNED)

David G. Sandahl

W A R D E N

DGS:bk

cc: A/W Childs A/W Obourn Major Waters Major Suits Gatehouse Armory Warden's File

Certified Mail # P 834 607 273

1801 S. 55th Avenue

Cicero, Illinois 60650

708-656-3250

September 7, 1990

David G. Sandahl, Warden

Shawnee Correctional Center

Box 400

Vienna, Illinois 62995

Dear Mr. Sandahl:

On July 18 my wife and I each received letters dated June 27, 1990, bearing postal meter dates of July 13, 1990. The body of the letter addressed to me stated

> "Please be advised that you have been placed on the Permanent Restriction List for visiting at the Shawnee Correctional Center as well as all correctional facilities within the Adult Division of the Department of Corrections. This restriction began

on June 16, 1990.

"This restriction is a result of your second violation of Departmental Rules in that you refused permission for staff to search your vehicle on May 13, 1990, and June 16, 1990. I am also advising you that you may request review of this restriction after a six-month period."

Prior to taking any other action with regard to the denial of a visit on the occasion of the June 16, 1990, picnic because of my refusal to waive my rights under the Fourth Amendment to the Constitution for the United States and Article I Section 6 of the Constitution of the State of Illinois I wish to know if there are any administrative procedures which afford a remedy to me.

Pursuant to Illinois Revised Statutes Chapter 116 Paragraph 201 et seq. demand is hereby made for a copy of the rules

under which the searches were made in vehicles belonging to visitors at the family picnic on June 16, 1990, and for the orders delegating authority to you and your staff to make such searches.

(SIGNED)

John C. Justice

Copy: Kenneth L. McGinnis, Director,
Department of Corrections
1301 Concordia Court
Springfield, Illinois 62708
217-522-2666

IN THE DISTRICT COURT

OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 90-3764

JOHN JUSTICE, et al., Plaintiffs,

vs.

LT. JERRY SUITS, et al., Defendants

THE HONORABLE GERALD B. COHN PRESIDING

APPEARANCES:

For the Plaintiff: John Justice

For the Defendant: Terrence Rock

HEARING ON MOTION FOR TRO

December 21, 1990

THE REPORTING SERVICE

308 Northcrest

Collinsville, Illinois 62234

(618) 345-1273

Reported by: Cindy Mahoney, CSR

(Be it remembered that an the 21st day of December, 1990, the matter as hereinabove set forth came on for hearing before the Honorable Gerald B. Cohn, and the following proceedings were had:)

MR. JUSTICE: Good morning, Your Honor. John Justice and Steven Lynch on motion for temporary restraining order. We would like to make an oral motion for a preliminary injunction and address the issue raised by Mr. Rock in his motion to dismiss the motion for temporary injunction.

THE COURT: Did you plan to give any testimony?

MR. JUSTICE: Yes, Your Honor.

THE COURT: Swear the witness.

JOHN JUSTICE and STEVEN LYNCH, CALLED AS WITNESSES, BEING FIRST DULY SWORN UPON THEIR OATHS, TESTIFIED AS FOLLOWS:

THE COURT: You may proceed, Mr. Justice.

MR. JUSTICE: The first condition for granting a preliminary injunction is that there would be irreparable harm to the plaintiffs if the preliminary injunction or temporary restraining order is not granted. For probably five years I have been the only

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visitor to plaintiff Lynch, except for persons who have been brought along with me to visit him.

The last visitor to him was his son, and I brought him down to Southern Illinois, and he went to visit plaintiff Lynch by himself. The plaintiffs recognize the reasonableness of a search on entering the prison and have not objected to that. But visitors have a reasonable expectation of privacy outside the confines of the prison where as under MacDonald vs. Hunter, inmates do not have unsupervised access to visitor's

property.

The second condition for granting a preliminary injunction is that the threatened injury outweighs the threatened harm to the defendants. Inmates and staff are adequately protected by search frisk search of visitors who enter the confines of the prison.

The third condition is that the plaintiffs have a reasonable expectation of success on the merits under MacDonald vs. Hunter, in which prison staff object to search of their cars outside the confines of the prison. The Appellate Court said that the district court did not abuse its discretion in granting a preliminary injunction. This was on appeal from the granting of a preliminary injunction.

MR. ROCK: I would have to object.

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Actually, at this time, I don't think Mr. Justice is testifying. He's just arguing case law at this point. I don't know how I will be able to cross examine him as to case law. I think we should limit it to testimony regarding the occurrence in question here on June 16th, 1990.

THE COURT: I would agree. The memorandums are sufficient to assist me as to the law in the area. And if I require more law, then I'll request that. If you could, just give me the facts that underlay the request.

MR. JUSTICE: All right, sir. The warden, in putting me on the permanent restriction list for visiting the Shawnee Correctional Center, said that I had denied a search of my vehicle on May 13th, 1990 and on June 16th, 1990.

The May 13th visit -- on the May 13th visit, I had a search of the vehicle. It was searched against my will and over my

objection. On June 16th, after having been told by the first defendant that I could not walk on to the property of the Shawnee Correctional Center, that I had to bring my vehicle on and allow it to be searched, I was told by Lieutenant Suits that I could not object to having my vehicle searched; that I had to grant him permission; that

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there was no face-saving statement to make it acceptable under the amendment to me that it was against my will and over my objection.

The matter can be reviewed after a six month period, which would be the 27th of December, but I don't intent to allow them to search my vehicle outside the confines of the Shawnee Correctional Center. So I will be permanently barred from visiting plaintiff Lynch.

THE COURT: Plaintiff Lynch, did you wish

to give some testimony?

MR. LYNCH: Yes, Your Honor- As plaintiff Justice pointed out, putting plaintiff Justice on the permanent restriction list for visiting at Shawnee Correctional Center amounts to complete denial of visits for me. I'm suffering a very lengthy sentence.

And I'm not from Illinois. My family lives far away. And they're unable to visit. On June 16th, there was a picnic for the inmates at Shawnee. And Mr. Justice and his wife planned to come to visit. And that's when the problem arose.

They're denying me visits. This amounts to a complete denial of visits for me. The visits enable me to maintain ties with the community and is sanity preserving. I have already served quite a bit of time

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on this sentence.

And this is a real hardship to have something like this happen. And the only reason that this is all happening is because the defendants have unlawfully attempted to compel Mr. Justice to give up his constitutional rights.

And unreasonable visiting restrictions violate the Eighth Amendment to the Constitution.

MR. ROCK: Objection. He's arguing the law at this point. He's not testifying.

THE COURT: Sustained. Stay on the defense.

MR. LYNCH: The defendant have deprived plaintiff Justice and myself of liberty and property without due process of law in violation of the --

THE COURT: Let's move on to cross examination. Mr. Rock.

MR. ROCK: I hope I didn't waive my right to cross examine Mr. Justice.

THE COURT: You didn't.

CROSS EXAMINATION BY MR. ROCK

Mr. Justice, you were claiming this occurred on June 16, 1990 and You went to visit Mr. Lynch at the Shawnee Correctional Center; is that correct?

A On the same day that other people were.

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Q For the purpose of just visiting and attending the picnic.

A That's correct.

Q Where exactly was it that your car was searched?

A It wasn't searched on the 16th, because I objected to it and refused to allow a search.

Q Were you allowed to visit at that time?

A No.

Q Were you arrested?

A I was told that I would be arrested if I didn't leave the State property.

Q Oh, so you were on State property at that time.

A They say so. I assume that it is.

Q Were there any signs warning you as you drove on to the State property that state that all vehicles were subject to search for contraband?

A I believe that's the case.

MR. ROCK: No further questions for Mr. Justice. May I move to cross examine Mr. Lynch?

THE COURT: You may.

(By Mr. Rock) Mr. Lynch, where's your family located?

A My wife lives in North Eastern Europe. And

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my two younger children live in up-state New York near the canadian border.

Q How old are they, Mr. Lynch?

A They're in their early teens. And my oldest son is in the service. And he was in Illinois going to school a couple months ago. But he was transferred. So

he's no longer in the area.

Q What are you presently incarcerated for?

A What am I incarcerated for?

Q Yes.

A I was convicted of murder.

Q How much more do you have to serve on your sentence?

A Eight more years to go.

MR. ROCK: No further questions, Your Honor.

THE COURT: Did you have any evidence you were going to present, Mr. Rock?

MR. ROCK: Yes. The People would call Correctional Officer Rich, please.

GARY RICH,

CALLED AS A WITNESS, BEING FIRST DULY SWORN UPON HIS OATH, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. ROCK

Q Please state your name for the record.

A Correctional Officer Gary Rich.

Q What's your occupation?

A I'm an Internal Affairs officer at the Shawnee Correctional Center.

Q How long have you been employed there?

A I've been employed at Shawnee since January, 1985, about six years.

Q Are you familiar with Mr. Justice?

A Yes, sir, I am.

Q Could you please point him out for the Judge.

A The gentleman there with the tan suit on. (indicating)

Q Okay. How are you familiar with Mr. Justice?

A I met Mr. Justice in May of this year; the shakedown that he was talking about, the vehicle that he talked about earlier.

Q What happened?

A Mr. Justice didn't want to consent to a vehicle search, which is standard procedure. When he was told that he would

have to leave if he didn't submit to one, he then gave permission.

Q Now, were you working on June 16th, 1990?

A Yes, sir, I was.

Q And what was going on at the correctional center that day?

A We were having out -- we have two inmate picnics a year. This was out first one. And we were doing vehicle searches.

Q Okay. Approximately how many visitors come on the picnic days?

A June 16th was the largest one we have ever had. We had over eight hundred visitors that day.

Q Are all the vehicles subject to search?

A Yes, sir.

Q And where are these searches done?

A Done in the parking lot when they pull off of the highway on to State property. They're asked permission, and the

searches are conducted in the parking area.

Q As a result of these searches, were there any contraband or weapons found on June 16?

A To the best of my knowledge, there was a couple weapons found, alcohol. There was one individual who had a warrant for him.

MR. ROCK: No further questions.

THE COURT: Mr. Justice, did you wish to

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cross examine the officer?

MR. JUSTICE: Yes, I do.

CROSS EXAMINATION BY MR. JUSTICE

Q On the May visit, you said that I objected to the search.

A In May, yes, sir.

Q And did I have anyone with me?

A Yes, sir. I believe you did. I believe you had Mr. Lynch's son with you.

Q Had I denied the search, then his son

would have been denied a visit also; is that correct?

A No, sir. His son --

MR. ROCK: Objection. Calls for speculation.

THE COURT: Overruled. It's preliminary. You can answer.

A No, sir.

Q He would not have been searched.

A He would have been searched when he came through the gate, but you would have had to leave with the vehicle. Mr. Lynch's son would not have been denied a visit.

Q I could not have been aware of that though,

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could I? I could have assume that he would have been denied a visit also.

MR. ROCK: Objection. He can't testify as to what the plaintiff knows or doesn't know.

THE COURT: I'll sustain that.

Q (By Mr. Justice) You said that I gave my permission for the search.

A Yes, sir.

Q And did I say at that time that it was against my will and over my objection?

A I don't recall, sir.

MR. JUSTICE: No further questions, Your Honor.

THE COURT: You may step down. The matter will be taken under advisement.

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REPORTER'S CERTIFICATE

I, CYNTHIA I. MAHONEY, Certified Shorthand Reporter, do certify that I was present and did report the proceedings in the above entitled cause and did at a later time cause the same to be transcribed into printed form. I further certify that pages 1-12, inclusive, are a true and accurate portrayal of my notes of the proceedings reported by me.
Dated this 28th day of October, 1991.
(SIGNED)
CYNTHIA I. MAHONEY, CSR

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN C. JUSTICE,

AND

STEVEN T. LYNCH,

Plaintiffs

vs. No. 90-3764

JUDSON CHILDS, Assistant Warden

of Shawnee Correctional Center,

~~AN UNKNOWN BLACK MALE,~~

Lt. JERRY SUITS,

Pfc. D.R. FRIEDMAN,

DAVID G. SANDAHL,

Warden of Shawnee Correctional Center,

GARY RICH, Internal Affairs Officer

of Shawnee Correctional Center

MICHAEL P. LANE,

Director of the Illinois Department

of Corrections, and

KENNETH L. McGINNIS,

Successor to Michael P. Lane as

Director of the Illinois Department

of Corrections, and

~~THE STATE OF ILLINOIS,~~

UNKNOWN EMPLOYEES OF

SHAWNEE CORRECTIONAL CENTER,

Defendants

AMENDED CONSTITUTIONAL RIGHTS COMPLAINT

WITH A JURY DEMAND

ALLEGATIONS COMMON TO ALL CLAIMS

JURISDICTION

This Complaint is brought under the Constitution for the United States of America for violation of the Plaintiffs' rights secured under the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments.

All events complained of took place on public property outside the confines of the Shawnee Correctional Center, in Johnson County, in the State of Illinois.

This is a civil rights action under 42 U.S.C. 1983. This Court has jurisdiction to hear this case under 28 U.S.C. § 1343.

The relief demanded for Declaratory Judgment finds jurisdiction in this Court under 28 U.S.C. §§ 2201 and 2202. If either Plaintiff lacks standing to bring this cause under 42 U.S.C. § 1983, this Court has jurisdiction to hear his complaint under 28 U.S.C. § 1331.

PARTIES

Plaintiff Justice is a citizen of the State of Illinois, born in the State of North Carolina, and has no privileges from the United States of America, or from the State of Illinois. He lives at 1801 S. 55th Avenue, Cicero, Illinois 60650. Plaintiff Lynch is a citizen of the State of New York, and is presently incarcerated as inmate number N-04276 in the Shawnee Correctional Center of the Illinois Department of Corrections at Vienna, Illinois 62995. The individual Defendants are sued in their individual capacities ~~and in their capacities as~~

~~employees--of--the--State--of--Illinois~~. Defendants Assistant Warden Judson Childs ~~Unknown-Black-Male~~, Lt. Jerry Suits, Gary Rich, and Warden David G. Sandahl may be addressed at Shawnee Correctional Center, Highway 146E, Vienna, Illinois 62995. Defendant Pfc. D.R. Friedman is a State Highway Patrolman who may be addressed at State Police Headquarters, Route 1 Box 20 A, Ullin, Illinois 62992-9706.

Defendant Michael P. Lane is former Director of the Illinois Department of Corrections who may be addressed at Director of the Department of Transportation, 2300 S. Dirksen Parkway, Springfield, Illinois 62764.

Defendant Kenneth L. McGinnis is Director of the Illinois Department of Corrections who may be addressed at Director of the Illinois Department of Corrections, 1301 Concordia Court, Springfield, Illinois 62702.

Defendant Assistant Warden Judson Childs ~~Unknown--Black--Male~~ is about 5'8" tall, with salt-and-pepper hair and moustache, weighs about 170 pounds, was wearing a short-sleeved shirt which had alternating dark and light vertical stripes approximately 1/2 to 5/8-inch wide, and from the deference given to him, appeared to outrank the Lieutenant Defendant Jerry Suits.

Defendants Unknown Employees of Shawnee Correctional Center were and perhaps still are at Shawnee Correctional Center.

FACTS

1. Plaintiffs Lynch and Justice have known each other since before Lynch was arrested and incarcerated in 1979. Justice asked Lynch to be placed on his Visitors List while Lynch was at Menard Penitentiary and has visited Lynch numerous times, alone and with others, since 1985 or thereabouts.

2. During all those years of visiting, while Lynch was at Menard and then at Shawnee Correctional Center, Justice accepted with understanding the necessity of undergoing searches of his person within the confines of the prison prior to visits. His vehicle was parked outside the confines of the prison, not subject to unsupervised access by inmates. On no occasion was his vehicle subjected to search until his visit for a family picnic on or about June, 1989.

3. The right to visit Plaintiff Lynch by Plaintiff Justice was established by a long series of visits.

4. On one of the Saturdays in the latter part of May or early June, 1989, Shawnee Correctional Center of the Illinois Department of Corrections held a picnic for the benefit of inmates of the facility to which family members and friends were invited.

5. Plaintiff Justice and his wife attended the picnic and were searched over Justice's objection. An Unknown Employee of Shawnee Correctional Center, when told by Justice that he objected to the search, asked, "Why, are you packing a weapon?" Justice replied, "No, I just don't like to be searched; it's in violation of the Fourth Amendment and of Article I Section 6 of the Constitution of the State of Illinois." The Unknown Employee said, "Yeah, we put up with a lot of <bleep> here." The perfunctory search was conducted on public property outside the confines of Shawnee Correctional Center, where the vehicle was never accessible to unsupervised inmates of the prison. The search was completed and Justice and his wife attended the picnic, although irreparably damaged by the warrantless search. Plaintiff Justice has protected liberty

interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Unknown Employee acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

6. Kenneth L. McGinnis replaced Michael P. Lane as Director of the Illinois Department of Corrections between the time of the damage complained of in Paragraph 5. and subsequent events complained of.

7. On May 13, 1990, Plaintiff Justice and Hans Lynch, Plaintiff Lynch's son, came to visit Plaintiff Lynch. When they were signing in, an Unknown Employee approached Plaintiff Justice and asked if he might have permission to search

Justice's car. Plaintiff Justice replied, "No." The Unknown Employee said, "You'll have to wait right here while I talk to my supervisor." The Supervisor came back with him and two other Unknown Employees and asked, "What seems to be the problem here?" He was told that the first Unknown Employee had asked to search and that he did not have probable cause to search. The Supervisor said, "You either let us search your vehicle or this visit is terminated." Because Plaintiff Lynch had not seen his son since before he was arrested in 1979, and the reason for the visit was for his son to see him, Plaintiff Justice said, "You can search the car, but it's against my will and over my objection, without probable cause, and in violation of the Fourth Amendment to the United States Constitution and Article I Section 6 of the Illinois Constitution." Plaintiff

Justice was humiliated before Plaintiff Lynch's son by being forced to submit to a procedure that violated his rights. The search was completed under duress, and the visit was accomplished, although the violation of his rights rankled Plaintiff Justice and diminished the enjoyment of the visit. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Unknown Employees acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

8. On Saturday, June 16, 1990, Shawnee Correctional Center of the Illinois Department of Corrections held a

picnic for the benefit of inmates of the facility to which family members and friends were invited.

9. Plaintiff Justice with his wife had long planned to visit Plaintiff Lynch on this happy occasion, and Plaintiff Lynch had looked forward to their visit eagerly also.

10. Plaintiff Justice parked his car in the shade of trees a quarter mile from Shawnee Correctional Center and walked with his wife toward the facility. A guard came across State Highway 146 and met them a hundred yards from the intersection. He was carrying a hand-held transceiver and was talking with someone on it. He asked, "Are you all just out for a walk.....?" Plaintiff Justice said, "We're just walking." The guard said over the transceiver, "They're just locals." Then he said to Plaintiff Justice, "We have to search all these

cars here. We have a problem with contraband." A half-dozen cars were waiting south of the highway in line to enter the external parking grounds of the facility.

11. Plaintiff Justice and his wife crossed the highway and walked toward a guard who was handing out a memorandum of picnic guidelines. The memorandum of guidelines nowhere advised visitors that their vehicles would be searched. The Defendant Assistant Warden Judson Childs ~~Unknown--Black--Male~~ rushed up and confronted Plaintiff Justice and asked, "Where are you going?" Plaintiff Justice replied, "We're going to the picnic." Defendant Assistant Warden Judson Childs ~~Unknown-Black-Male~~ asked, "Did you come in a vehicle?" Plaintiff Justice replied, "Almost everyone came in a vehicle from somewhere." Defendant Assistant Warden Judson Childs ~~Unknown~~

~~Black-Male~~ replied, "You're not taking another step farther here unless you bring your vehicle." Plaintiff Justice asked, "You mean we can't walk onto the property?" Defendant Assistant Warden Judson Childs ~~Unknown-Black-Male~~ said, "That's right. You either bring your vehicle and let us search it or this visit is terminated."

12. Plaintiff Justice and his wife turned and walked back to their car. On the way, the driver of another car asked, "Are they turning people away?" Plaintiff Justice replied, "No, they won't let you in if you walk in; you have to arrive in a car and they demand that they search it. What does that tell you about your rights? They're trashing the Fourth Amendment."

13. A guard ran from across the highway and said to Plaintiff Justice, "Don't try to get a ride with some of

these other visitors; you have to come in your own car."

14. Plaintiff Justice and his wife retrieved their car and got in line with the cars waiting to cross Highway 146E. One-half hour after first coming to Shawnee Correctional Center, the car became the first in line. Defendant Lt. Jerry Suits bent down to the window on the driver's side of the car and asked and was given the name of the driver. He then asked, "Do you object to our searching your car, ma'am?" Plaintiff Justice got out of the right side of the car and said, "I do. It's in violation of the Fourth Amendment and of Article I Section 6 of the Illinois Constitution."

15. Defendant Lt. Suits replied, "The Constitution's got nothing to do with it: we're demanding that you give us your permission to search your car."

16. Plaintiff Justice said, "So if I

don't waive my rights under the Constitution, you're going to deny me the right to visit my friend?"

17. Defendant Lt. Suits said, "That's right. I've searched four hundred vehicles this morning and I've got more to do. You either allow us to search your car or you get out of here."

18. Plaintiff Justice said, "And I'll bet you didn't find one bit of contraband in any of the four hundred cars."

19. Defendant Lt. Suits said, "Oh, yes we did. But I don't have to discuss that with you. I've got work to do."

20. Defendant Assistant Warden Judson Childs ~~Unknown--Black--Male~~ came up and said, "You either let us search you or you get off State property. Call the State Highway Patrolman."

21. Plaintiff Justice asked, "What is your name?"

22. Defendant Assistant Warden Judson

Childs ~~Unknown Black Male~~ said, "That's irrelevant."

23. Pfc. D.R. Friedman arrived and said, "What's going on here?" and was given a synopsis of what had taken place, after which he said, "You either let them search your car, or you get off the property."

24. Plaintiff Justice asked for and was given Pfc. Friedman and Lt. Suits names and Pfc. Friedman said, "Get off the property or I'll have to arrest you," whereupon Plaintiff Justice and his wife summarily departed.

25. On July 18 Plaintiff Justice received a letter dated June 27, 1990; the envelope bore a postal meter date of July 13, 1990. The body of the letter stated,

> "Please be advised that you have been placed on the Permanent Restriction List for visiting at the Shawnee

Correctional Center as well as all correctional facilities within the Adult Division of the Department of Corrections. This restriction began on June 16, 1990.

"This restriction is a result of your second violation of Departmental Rules in that you refused permission for staff to search your vehicle on May 13, 1990, and June 16, 1990. I am also advising you that you may request review of this restriction after a six-month period."

The letter is initialed over the signature block of David G. Sandahl, Warden, with distribution to Assistant Warden Childs, Assistant Warden Obourn, Major Waters, Major Suits, Gatehouse, Armory, and the Warden's File.

26. On September 7, 1990 Plaintiff Justice sent a letter by Certified Mail with Return Receipt Requested to

Defendant Sandahl with a copy to Defendant Kenneth L. McGinnis, addressed to Director, Department of Corrections, 1301 Concordia Court, Springfield, Illinois 62708. Signed receipts were received from both Defendants. The body of the letter stated:

"On July 18 my wife and I each received letters dated June 27, 1990, bearing postal meter dates of July 13, 1990. The body of the letter addressed to me stated

"`Please be advised that you have been placed on the Permanent Restriction List for visiting at the Shawnee Correctional Center as well as all correctional facilities within the Adult Division of the Department of Corrections. This restriction began on June 16, 1990.

"`This restriction is a result of your second violation of Departmental

Rules in that you refused permission for staff to search your vehicle on May 13, 1990, and June 16, 1990. I am also advising you that you may request review of this restriction after a six-month period.'

"Prior to taking any other action with regard to the denial of a visit on the occasion of the June 16, 1990, picnic because of my refusal to waive my rights under the Fourth Amendment to the Constitution for the United States and Article I Section 6 of the Constitution of the State of Illinois I wish to know if there are any administrative procedures which afford a remedy to me.

"Pursuant to Illinois Revised Statutes Chapter 116 Paragraph 201 et seq. demand is hereby made for a copy of the rules under which the searches were made in vehicles belonging to

visitors at the family picnic on June 16, 1990, and for the orders delegating authority to you and your staff to make such searches."

No reply was received from either Defendant. The rules and delegation orders demanded in the final paragraph were not received.

27. On information and belief, the search policies in use at Shawnee Correctional Center are the result of policies formulated, instituted, and continued by Defendant Gary Rich, who, as Internal Affairs Officer at Shawnee Correctional Center was responsible for the search procedures unconstitutionally used at Shawnee Correctional Center and wantonly, willfully, and maliciously applied by Defendants Unknown Employees of Shawnee Correctional Center, Assistant Warden Judson Childs, Jerry Suits, Gary Rich, David G. Sandahl, D.R. Friedman,

Michael P. Lane, and Kenneth L. McGinnis, either by direct use, or by explicit or tacit approval. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and of the United States of which he has been deprived by operation of the rules and procedures written or unwritten instituted at Shawnee Correctional Center without due process of law.

CLAIMS

FIRST ~~CAUSE OF ACTION~~ CLAIM OF UNREASONABLE SEARCH

28. 1. As alleged in paragraphs 1. through 5. and 27., Plaintiff Justice's vehicle was searched over his objection, without warrant, without probable cause and without reasonable suspicion.

A. Defendants David G. Sandahl, Gary Rich, Michael P. Lane, and the Unknown Employee of Shawnee Correctional Center

knew or should have known that their wanton, willful, malicious acts violated Plaintiff Justice's rights secured under the Constitution of the State of Illinois and the Constitution for the United States. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by Defendants David G. Sandahl, Gary Rich, Michael P. Lane, and the Unknown Employee of Shawnee Correctional Center acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

SECOND ~~CAUSE OF ACTION~~ CLAIM OF UNREASONABLE SEARCH

29. As alleged in paragraphs 2., 3., 6., 7., and 27., Plaintiff Justice's vehicle

was searched over his objection, without warrant, without probable cause and without reasonable suspicion. Plaintiff Justice's right to be free from Unreasonable Searches is guaranteed by the Illinois Constitution, Article I, Section 6, and by the Fourth Amendment to the Constitution for the United States as applied to the States under the Fourteenth Amendment.

A. Defendants David G. Sandahl, Gary Rich, Kenneth L. McGinnis, and Unknown Employees of Shawnee Correctional Center knew or should have known that their wanton, willful, malicious acts violated Plaintiff Justice's rights secured under the Constitution of the State of Illinois and the Constitution for the United States. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which

he has been deprived without due process of law. The conduct complained of was committed by Defendants David G. Sandahl, Gary Rich, Kenneth L. McGinnis, and the Unknown Employees acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

~~(THIRD CAUSE OF ACTION~~

FIRST CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

30. Defendant Assistant Warden Judson Childs ~~Unknown Black Male~~ knew or should have known that he lacked jurisdiction to order a private citizen to arrive by any particular means of transportation and in ordering Plaintiff Justice to submit his vehicle to a search or have his visit terminated, violated the rights of the Plaintiff ~~secured under the Fourth, Fifth, Ninth and Fourteenth Amendments to~~

~~the Constitution for the United States of America, which he is sworn to uphold~~ by retaliating against the Plaintiff for having asserted a Constitutional right. The instruction to Plaintiff by a guard under the order from Defendant Childs that the Plaintiff could not ride in someone else's car was arbitrary and capricious and served no legitimate purpose. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Defendant Assistant Warden Judson Childs acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

(~~FOURTH CAUSE OF ACTION~~)

SECOND CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

31. Defendant Lt. Jerry Suits knew or should have known that he lacked jurisdiction to order a private citizen to submit to a search without probable cause or without reasonable suspicion, and his demand that Plaintiff Justice waive his rights secured under the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution for the United States of America, violate Plaintiff Justice's rights ~~to--the security--of~~ secured under that Constitution, which he is sworn to uphold, in attempting to compel him to give up one or more rights to enjoy the privilege of a visit. By denying a visit to Plaintiff Justice unless he waived his rights, Defendant Suits retaliated against the Plaintiff for having asserted a Constitutional right. Plaintiff Justice has protected liberty

interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by Defendant Suits acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

(~~THIRD CAUSE OF ACTION~~

THIRD CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

32. Defendant Pfc. D.R. Friedman knew or should have known that he lacked jurisdiction to order a private citizen to submit to a search without probable cause or without reasonable suspicion, and his demand that Plaintiff Justice waive his rights secured under the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution for the

United States of America, violated Plaintiff Justice's rights ~~to--the security--of~~ secured under that Constitution, which he is sworn to uphold, in attempting to compel him to give up one or more rights to enjoy the privilege of a visit. By ordering Plaintiff Justice to ".... either let them search your car, or you get off the property," and "Get off the property or I'll have to arrest you," Defendant Friedman retaliated against Plaintiff Justice for having asserted a Constitutional right. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by Defendant Friedman acting under color of State Law. This conduct deprived Plaintiff

Justice of rights secured by the Constitution of the United States.

(~~FOURTH CAUSE OF ACTION~~)

FOURTH CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

33. Defendant Warden David G. Sandahl, knew or should have known that he lacked jurisdiction to order a private citizen to submit to a search without probable cause, or without reasonable suspicion, and his supervision of Illinois Department of Corrections' or Shawnee Correctional Center policies which demand that visitors waive rights secured under the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution for the United States of America, violate Plaintiff Justice's rights ~~to--the security--of~~ secured under that Constitution, which he is sworn to uphold, in attempting to compel him to give up one or more rights to enjoy the

privilege of a visit. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by Defendant Sandahl acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

~~(FIFTH CAUSE OF ACTION~~

FIFTH CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

34. Defendant David G. Sandahl, knew or should have known that he could not deny a privilege extended freely to others because of Plaintiff Justice's assertion of a right secured under the Constitutions of the United States and the State of Illinois. In denying those privileges for a period of six months

subject to review on request by Plaintiff Justice. Defendant Sandahl retaliated against the Plaintiff for having asserted a Constitutional right. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by Defendant Sandahl acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

(~~SIXTH CAUSE OF ACTION~~)

SIXTH CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

35. Michael P. Lane, Director of the Illinois Department of Corrections, knew or should have known that he lacked jurisdiction to order a private citizen to submit to a search without probable

cause, or without reasonable suspicion, and his instituting, or allowing to be instituted, of Illinois Department of Corrections' or Shawnee Correctional Center policies which demand that visitors' vehicles be searched prior to being allowed to visit ~~waive--rights secured--under--the--Fourth,--Fifth,--Ninth and--Fourteenth--Amendments--to--the Constitution--for--the--United--States--of America,~~ violated Plaintiff Justice's rights ~~to-the-security-of~~ secured under that Constitution, which he is sworn to uphold, as complained of in Paragraphs 1. through 5., in ~~attempting-to~~ compelling him to give up one or more rights to enjoy the privilege of a visit. Defendant Lane was responsible for the policies of the Defendants who were his employees when he was Director of the Illinois Department of Corrections. Plaintiff Justice has protected liberty

interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by Defendant Lane acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

(~~SEVENTH CAUSE OF ACTION~~)

SEVENTH CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

36. Kenneth L. McGinnis, Successor to Michael P. Lane as Director of the Illinois Department of Corrections, knows or should know that he lacks jurisdiction

to order a private citizen to submit to a search without probable cause, or without reasonable suspicion, and his allowing to be continued, policies of the Illinois Department of Corrections which demand that visitors waive rights secured under the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution for the United States of America, violated Plaintiff Justice's rights ~~to--the security--of~~ secured under that Constitution, which Defendant McGinnis is sworn to uphold, in attempting to compel Plaintiff Justice to give up one or more rights to enjoy the privilege of a visit, as complained of in Paragraphs 2., 3., 6. et seq. By failing to respond to the copy of Plaintiff Justice's letter to Defendant Sandahl, or exerting due diligence in supervising his employee Defendant Sandahl, Defendant McGinnis retaliated against Plaintiff Justice for

having asserted a Constitutional right. The conduct complained of was committed by Defendant McGinnis acting under color of State Law. This conduct deprived Plaintiff Justice of rights secured by the Constitution of the United States.

(~~EIGHTH CAUSE OF ACTION~~)

FIRST CLAIM OF DEPRIVATION OF RIGHTS WITHOUT DUE PROCESS

37. The ~~State of Illinois and its public servants~~ Defendants, each and severally, have deprived Plaintiff Justice of liberty and property without due process of law ~~in violation of the prohibition to the State under the Fourteenth Amendment to the Constitution for the United States~~. Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law.

The conduct complained of was committed by the Defendants, each and severally, acting under color of State Law. This conduct deprived Plaintiff Lynch of rights secured by the Constitution of the United States.

~~(NINTH CAUSE OF ACTION~~

SECOND CLAIM OF DEPRIVATION OF RIGHTS WITHOUT DUE PROCESS

38. The ~~State of Illinois and its public servants~~ Defendants, each and severally have deprived Plaintiff Lynch of liberty and property without due process of law ~~in violation of the prohibition to the State under the Fourteenth Amendment to the Constitution for the United States~~, and have violated his rights secured under Illinois law by retaliating against Plaintiff Justice for having asserted a Constitutional right. Plaintiff Lynch has protected liberty interests secured under Illinois law and

the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Defendants, each and severally, acting under color of State Law. This conduct deprived Plaintiff Lynch of rights secured by the Constitution of the United States.

~~(TENTH CAUSE OF ACTION~~

FIRST CLAIM OF INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT

39. The ~~State of Illinois and its public servants~~ Defendants, each and severally in depriving Plaintiff Lynch of liberty and property without due process of law have inflicted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution for the United States as applied to the State under the Fourteenth Amendment to the Constitution for the United States, as a

result of their having retaliated against Plaintiff Justice for having asserted a Constitutional right. Plaintiff Lynch has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Defendants, each and severally, acting under color of State Law. This conduct deprived Plaintiff Lynch of rights secured by the Constitution of the United States.

(~~ELEVENTH CAUSE OF ACTION~~)

EIGHTH CLAIM OF RETALIATION

FOR HAVING ASSERTED A CONSTITUTIONAL RIGHT

40. In placing Plaintiff Justice on the Permanent Restriction List for visiting at the Shawnee Correctional Center as well as all correctional facilities within the Adult Division of

the Department of Corrections, Defendant Sandahl is wantonly, willfully, and maliciously denying Plaintiffs Justice and Lynch the sanity-preserving pleasures of visiting because of Plaintiff Justice's assertion of a right protected by the Constitution for the United States, by retaliating against Plaintiff Justice for having asserted a Constitutional right. Plaintiffs Justice and Lynch have protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which they have been deprived without due process of law. The conduct complained of was committed by the Defendant Sandahl acting under color of State Law. This conduct deprived Plaintiffs Justice and Lynch of rights secured by the Constitution of the United States.

~~(TWELFTH CAUSE OF ACTION~~

SECOND CLAIM OF DEPRIVATION OF RIGHTS

WITHOUT DUE PROCESS

41. Defendant Gary Rich knew or should have known that in designing security procedures he was wantonly, wilfully and maliciously violating the rights of citizens when he instituted and/or continued searches of citizens' vehicles outside the confines of Shawnee Correctional Center where inmates do not have unsupervised access to the vehicles, and Defendants Unknown Employees of Shawnee Correctional Center, Judson Childs, Jerry Suits, Gary Rich, David G. Sandahl, D.R. Friedman, Michael P. Lane, and Kenneth L. McGinnis, knew or should have known that they were wantonly, wilfully and maliciously violating the rights of citizens when they searched or allowed searches of citizens' vehicles outside the confines of Shawnee Correctional Center where inmates do not

have unsupervised access to the vehicles. Visitors have a protected liberty interest to be free from unreasonable searches protected from arbitrary governmental invasion. The Defendants, each and severally, if they are reasonably prudent men, knew or should have known that their acts violate due process. Plaintiffs Justice and Lynch have protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which they have been deprived without due process of law. The conduct complained of was committed by Defendant Rich acting under color of State Law. This conduct deprived Plaintiffs Justice and Lynch of rights secured by the Constitution of the United States.

RELIEF

WHEREFORE, the Plaintiffs request this Honorable Court grant the following

relief:

A. Issue a declaratory judgment that the individual Defendants violated the United States Constitution when they searched vehicles of friends and families visiting the Shawnee Correctional Center without ~~probable--cause~~ reasonable suspicion.

B. ~~Issue-a-declaratory-judgment-that the-Defendant-State-of-Illinois-violated the-United-States-Constitution-when-the State-and-its-employees-in-the-Illinois Department--of--Corrections--ordered--the searching--of--vehicles--of--friends--and families---visiting---the---Shawnee Correctional--Center--without--probable cause.~~

C. Issue an injunction ordering that the Defendants refrain from searching privately-owned vehicles that enter upon the property of the State of Illinois outside the confines of a correctional

center where inmates are not given unsupervised access unless there be ~~probable-cause~~ reasonable suspicion that a crime has been committed in which a particular vehicle has been implicated.

D. Grant compensatory damages in the amount of the costs of Plaintiff Justice's travel, time, and costs of this suit.

E. Grant punitive damages in favor of each of the Plaintiffs in the amount of $10,000 from each of the Defendants.

F. Grant such other relief as it may appear Plaintiffs are entitled.

Respectfully submitted, (SIGNED) John C. Justice, 1801 S. 55th Avenue, Cicero, Illinois 60650, 708-656-3250

(SIGNED) Steven T. Lynch N-04276, Box 300, Shawnee Correctional Center Vienna, Illinois 62995, 618-658-8331

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 90-3764

JOHN JUSTICE, et al., Plaintiffs,

vs.

LT. JERRY SUITS, et al., Defendants

THE HONORABLE GERALD B. COHN PRESIDING

APPEARANCES:

For the Plaintiff: Mr. John Justice,

Pro Se

For the Defendant: Mr. Terrence T. Rock,

Assistant Attorney General

HEARING ON MOTION TO DISMISS

March 15, 1991

Reported by: Sherrie L. Merz, C.S.R.

THE REPORTING SERVICE

308 Northcrest

Collinsville, Illinois 62234

(618) 345-1273

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WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT BEFORE THE HONORABLE GERALD B. COHN ON MARCH 15, 1991.

THE COURT: Mr. Rock, did you get a copy of the amended complaint?

MR. ROCK: Yes, Your Honor, I did. Would we be able to file an objection to the motion for leave to file an amended complaint? I understand it's unusual.

THE COURT: Wait until Lynch gets here. As I read the rule, he's got an absolute right to amend since there's been no answer filed at this point.

MR. ROCK: I know that but his amended complaint is in substance really no different than the original complaint.

THE COURT: Well, then, if you want to ask the Court to allow your motion to dismiss to stand as a motion to dismiss on the amended complaint, we can proceed on that basis.

MR. ROCK: Well, we could do that, Your Honor. Thank you.

MR. JUSTICE: At the outset, Your Honor, the plaintiffs would like to object that the Attorney General Mr. Rock has not, based on information and belief, filed an appearance in this case. And we're prejudiced by not

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knowing whom he represents.

THE COURT: Doesn't the motion to dismiss recite that?

MR. JUSTICE: No, Your Honor.

MR. ROCK: It doesn't address specific defendants. I represent all the defendants. I just put come now all the defendants.

MR. JUSTICE: So all the defendants. Thank you, Your Honor.

MR. ROCK: Your Honor, I think I probably do need to file a different motion to dismiss. I don't think it addresses all

of this. He's also substituted I think a couple of individuals and it's not entirely clear who is still in this, with the amended complaint.

MR. JUSTICE: If the Attorney General wishes to have a continuance to file an answer to the amended complaint, we have no objection to that, Your Honor.

THE COURT: All right. Show that the order is entered allowing the amended complaint. That moots out the motion to dismiss. How much time you want to respond, Mr. Rock?

MR. ROCK: Probably ten days, Your Honor.

THE COURT: Ten days to respond.

MR. JUSTICE: And we would like ten days to file a response to his --

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THE COURT: Assuming that he files a motion to dismiss?

MR. JUSTICE: Yes, Your Honor.

THE COURT: You don't need to ask for

that. I can't even anticipate that he files a motion to dismiss. He may file an answer for all I know. Okay.

MR. JUSTICE: Thank you, Your Honor.

* * *

REPORTER'S CERTIFICATE

I, SHERRIE L. MERZ, Certified Shorthand Reporter, do certify that I was present and did report the proceedings in the above-entitled cause and did at a later time cause the same to be transcribed into printed form. I further certify that pages 2-4, inclusive, are a true and accurate portrayal of my notes of the proceedings reported by me.

Dated this 10th day of October, 1991.

(SIGNED)

Sherrie L. Merz, C.S.R.

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF ILLINOIS

No. 90-3764

JOHN JUSTICE and STEVEN LYNCH,

Plaintiffs,

VS.

MICHAEL P. LANE, et al.,

Defendants.

MOTION TO DISMISS

PLAINTIFFS' AMENDED COMPLAINT

Now come defendants, by their attorney, Roland W. Burris, Attorney General of the State of Illinois, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move this court to dismiss plaintiffs' amended complaint.

In support of their motion, defendants state as follows:

1. That plaintiffs filed their amended complaint on or about March 10,

1991.

2. That plaintiffs in their amended complaint contest the propriety of the search procedures conducted regarding visitors of the Shawnee Correctional Center.

3. That plaintiff John Justice has no liberty or property interest in visiting an inmate incarcerated at the Shawnee Correctional Center.

4. That plaintiff John Justice lacks standing to assert such a right.

5. That plaintiffs' amended complaint fails to allege the personal involvement of defendants Lane and McGinnis in the deprivation of any constitutionally protected right.

6. That defendants submit the attached memorandum of law in support of their motion to dismiss plaintiff's amended complaint.

WHEREFORE, defendants respectfully move this honorable court to dismiss plaintiffs' amended complaint for failure to state a claim upon which relief can be granted.

TERRENCE T. ROCK
Assistant Attorney General 500 South Second Street
Springfield, Illinois 62706 (217) 782-1090
Of Counsel.

Respectfully submitted,

MICHAEL P. LANE, et al.,

Defendants,

ROLAND W. BURRIS, Attorney General,
State of Illinois,

Attorney for Defendants,

(SIGNED)

TERRENCE T. ROCK
Assistant Attorney General

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF ILLINOIS

No. 90-3764

JOHN JUSTICE and STEVEN LYNCH,

Plaintiffs,

VS.

MICHAEL P. LANE, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Now come defendants, by their attorney, Roland W. Burris, Attorney General of the State of Illinois, and submit the following memorandum of law in support of defendants' motion to dismiss plaintiffs' Amended Complaint.

FACTS

Plaintiffs, John Justice and Steven Lynch, filed this Amended Complaint pursuant to 42 U.S.C. § 1983. Plaintiff

Steven Lynch is a resident of the Illinois Department of Corrections incarcerated at the Shawnee Correctional Center. Plaintiff John Justice is a friend of Mr. Lynch that has been denied visitation by the Illinois Department of Corrections.

On or about June 16, 1990, plaintiff Justice came to the Shawnee Correctional Center for the purpose of attending a picnic at the prison and to visit with plaintiff Lynch. Plaintiff Justice states in the complaint that he and his wife parked their car approximately a quarter mile from the Shawnee Correctional Center. (Plaintiff's Amended Complaint, par. 10). Plaintiff Justice was informed by a correctional employee that they could not walk onto the property. Plaintiff Justice was informed that they had to drive and that their vehicle was subject to inspection.

When plaintiff Justice's vehicle arrived at the inspection point, plaintiff Justice refused to allow his vehicle to be searched. After being told no search-no visit, plaintiff Justice left. (Plaintiff's Amended Complaint, par. 24.)

On July 18, 1990, plaintiff Justice states that he received a letter from Warden Sandahl advising him that he was placed on the Permanent Restriction List for visiting at the Shawnee Correctional Center and all other adult correctional facilities located in the State of Illinois. Said restriction is subject to review after six months. (Plaintiff's Amended Complaint, par. 25).

Plaintiff's Amended Complaint consists of 13 counts. Plaintiffs seek declaratory and injunctive relief as well as compensatory and punitive damages.

It should be noted that although the Amended Complaint is brought

by both Lynch and Justice, the only conduct complained about regards the attempt of Mr. Justice (a free man) to enter the Shawnee the Shawnee Correctional Center.

ARGUMENT

COUNT ONE SHOULD BE DISMISSED AS PLAINTIFF JUSTICE HAS NO CONSTITUTIONAL RIGHT TO VISIT AN INCARCERATED PERSON.

Plaintiff Justice alleges in Count One of the Amended Complaint that defendants Lane, Sandahl and Rich subjected him to an unreasonable search over his objection.

Plaintiff Justice has failed to allege the personal involvement of Lane and Sandahl as to Count One. Accordingly, Count One should be dismissed as to Lane, Sandahl, and Rich. It is imperative that the plaintiff must allege the direct personal involvement of

each defendant in the violation of his constitutional rights. Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986). Absent a factually supported allegation that defendants Lane, Sandahl and Rich took part in the "alleged" search or deliberately chose not to prevent the "alleged" search after having received actual knowledge of it, no cause of action has been alleged against them. See Campbell v. Greer, 831 F.2d 700, 702 (7th Cir. 1987).

Plaintiff Justice admits in the Amended Complaint at paragraph 20 that the alleged search took place on state property at the Shawnee Correctional Center. (It should be noted that according to plaintiff's original Complaint the search was never conducted.) (Plaintiff's Complaint, p. 5.)

The Rules pertaining to

visiting persons incarcerated within the Illinois Department of Corrections are found at 20 Ill. Adm. 525.60(f) and state in pertinent part:

f) Any of the following actions on the part of a visitor may result in a temporary restriction of up to six months:

1) Disruptive conduct of a minor nature.

2) Disobeying an order or posted rule.

3) Refusal to submit to search.

4) Possession of drugs when the visitor has demonstrated there was no intent to conceal and/or introduce drugs into the facility.

5). Possession of alcohol when the visitor has demonstrated there was no

intent to conceal and/or introduce alcohol into the facility.

6) Being under the influence of alcohol or drugs.

7) Possession of other contraband as defined under State, federal or local laws or other Departmental rules not specifically outlined in this Subpart.

(Emphasis added.)

In a recent case, Elizabeth Mayo v. Lane, et al., 867 F.2d 374 (7th Cir. 1989), the Seventh Circuit held that there is no right for a free person to visit an incarcerated person. The court referred to the language of paragraph 1003-7-2(f) of chapter 38 of the Illinois Revised Statutes, "All of the institutions and facilities of the Department shall permit every

incarcerated person to receive visitors." The @o court stated that at most the language creates a right to receive visitors, not a right to visit. See also, United States ex rel. Adams v. O'Leary, 659 F. Supp. 736 (N.D. Ill. 1987) (emphasis added).

In the instant case, plaintiff Justice has no right to visit Mr. Lynch. Thus, if Mr. Justice seeks to enter a correctional facility in order to visit, he is subject to the rules and regulations relating to visitation. As noted, supra, refusal to submit to a search is basis for termination of visitation privileges. Accordingly, Count One should be dismissed against defendants Sandahl, Lane and Rich.

COUNT TWO OF PLAINTIFFS' AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

Count Two of plaintiff's Amended Complaint is duplicative of Count One but for the naming of defendant McGinnis in place of Lane. Plaintiff fails to allege the personal involvement of any of the defendants (Sandahl, McGinnis, or Rich) in the violation of any constitutional right in Count Two. See, Campbell v. Greer, 831 F.2d 700, 702 (7th Cir. 1987), and Mayo v. Lane et al., 867 F.2d 374.(78th Cir. 1989).

COUNT THREE

(First Claim of Retaliation)

Plaintiff Justice alleges in Count Three that defendant Childs "retaliated" against plaintiff Justice for asserting a constitutional right. In order to state a cause of action for retaliation, plaintiff Justice must allege that he had a constitutional right to enter the correctional center without being searched. The Mayo court clearly

established that plaintiff Justice has no such right.

Plaintiff's claim that refusing entry into the facility was retaliatory is absurd and frivolous. Accordingly, Count Three should be dismissed.

COUNT FOUR

(Second Claim of Retaliation)

Plaintiff Justice restates the allegations of Count Three in Count Four against defendant Suits. For the reasons set forth in @o, Count Four should also be dismissed.

COUNT FIVE

(Third Claim of Retaliation)

Count Five is a claim of retaliation brought by Justice against Trooper Friedman. Plaintiff Justice alleges that defendant Friedman, a State Trooper, "should have known that he lacked jurisdiction,to order a private citizen to submit to a search without

probable cause ... ." Plaintiff Justice concludes that defendant Friedman demanded plaintiff waive his rights under the Fourth, Fifth, Ninth and Fourteenth Amendments. Plaintiff admits that the search was never conducted. Plaintiff and his wife left rather than submit to a search of their vehicle on prison property by prison officials. (Plaintiff's Original Complaint, p. 5.)

It stands to reason that if plaintiff Justice has no right to visit a prison as outlined by the Mayo court, then he certainly has no right to remain on prison property and create a disturbance. With no right to visit or remain on the prison property, Trooper Friedman acted properly in asking Mr. Justice to leave or be arrested for trespassing.

COUNT SIX

(Fourth Claim of Retaliation)

Count Six is directed solely at defendant Warden Sandahl. Plaintiff Justice's claim against Warden Sandahl is ludicrous. Plaintiff asserts that the Warden of the Shawnee Correctional Center has no authority to submit visitors to a search prior to entering the facility. This argument is absurd, Even plaintiff Justice must see the need for such searches. Furthermore, the Administrative Regulations allow for searches of visitors. According to Mayo, plaintiff has no right to enter the correctional facility. Therefore, plaintiff is subject to the rules and regulations pertaining to admission for visits.

When, as in the instant case, an individual's visiting privileges are terminated, the Warden is required to give the person notice. 20 Ill. Adm. 525.60(k) states:

k) Written notification of temporary or permanent restriction of visiting privileges shall be sent to the visitor and to the committed person. Any person excluded from a committed person's visiting list correctional facility may be excluded at all facilities. The notice of temporary restriction shall state the exact length of the restriction. The notice of permanent restriction shall inform the visitor that he may request that the Chief Administrative Officer review the decision after a six-month period.

Plaintiff Justice admits at paragraph 25 of the Amended Complaint that this provision was complied with by defendant Sandahl. Nowhere in plaintiff's Amended Complaint is there any indication that administrative review of this decision has been sought.

Count Six (Fourth Claim of Retaliation)

fails to state a cause of action against defendant Sandahl and should be dismissed.

COUNT SEVEN

(Fifth Claim of Retaliation)

Count Seven (Fifth Claim of Retaliation) is brought by Justice against Warden Sandahl. The plaintiff is clearly wrong in asserting that he has a liberty or property interest in visiting co-plaintiff at the Shawnee Correctional Center. (See Mayo.)

Plaintiff admits that denial of this privilege was subject to review after six months. The letter was dated July 13, 1990. (Amended Complaint, par. 25.) According to plaintiff, a demand was made for the policies regarding searches on or about September 7, 1990 by plaintiff Justice.

Plaintiff's Amended Complaint is conspicuously silent as to whether he

has sought review of the decision to terminate his visiting privileges. Plaintiff has an adequate administrative remedy but has not availed himself that remedy. Accordingly, Count Seven (Fifth Claim of Retaliation) should be dismissed for failing to state a cause of action against defendant Sandahl.

COUNT EIGHT

(Sixth Claim of Retaliation)

Count Eighth (Sixth Claim of Retaliation) is brought by plaintiff Justice against Michael P. Lane. The only mention of defendant Lane is that he is the Director of the Illinois Department of Corrections. There is no cause of action for respondeat superior in §1983 actions.

It is imperative that the plaintiff must allege the direct personal involvement of defendant Lane in the violation of a Constitutional right

afforded to plaintiff Justice. See Campbell v. Greer, 831 F.2d 700, 702 (7th Cir. 1987). Plaintiff has not met this threshold requirement, therefore Count Eight against defendant Lane must be dismissed.

COUNT NINE

(Seventh Claim of Retaliation)

Count Nine (Seventh Claim of Retaliation) is brought by plaintiff Justice against Kenneth McGinnis as the Director of the Illinois Department of Corrections. Plaintiff has not alleged the personal involvement of defendant McGinnis in any deprivation of a constitutionally-protected right enjoyed by plaintiff Justice.

Plaintiff claims that defendant McGinnis failed to respond to his letter and thus . lacked due diligence. A claim of negligence is insufficient to state a cause of action pursuant to §1983. See

Campbell v. Greer, et al., 831 F.2d 700, 702 (7th Cir. 1987).

COUNT TEN

(First Due Process Claim)

Plaintiff Justice asserts in Count Ten (First Due Process Claim) that each of the defendants have deprived him of liberty and property without due process.

The first inquiry in a due process analysis is to look at the liberty interest or property interest to be protected. In the instant case, plaintiff Justice has no right to visit an incarcerated person in a prison (i.e., co-plaintiff Lynch). See, Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989).

Furthermore, plaintiff Justice is afforded an opportunity to seek review of the decision denying visitation. Plaintiff's Amended Complaint fails to establish that he has attempted to review said decision.

Accordingly, Count Ten (First Due Process Claim) of Plaintiffs' Amended Complaint should be dismissed against all defendants for failing to state a cause of action under 42 U.S.C. §1983.

COUNT TEN

(Second Due Process Claim)

Count Ten (Second Due Process Claim) is brought by plaintiff Lynch against all of the defendants. Plaintiff Lynch alleges that defendants have deprived Lynch of liberty and property without due process by retaliating against co-plaintiff Justice.

This claim is conclusory and entirely without merit. Plaintiff Lynch fails to state what liberty or property interest is at stake. Even liberally construing this count as plaintiff Lynch's claim for visitation privileges, it fails to state a cause of action. Nowhere in the Amended Complaint is it

asserted that defendants have denied plaintiff Lynch visitation privileges. The only allegations contained in the Amended Complaint are concerning the denial of access to the prison of plaintiff Justice. As the Mayo court stated: "All of the institutions and facilities of the Department shall permit every person to receive visitors." Mayo v. Lane, et al., 867 F.2d 374 (7th Cir. 1989).

In the instant case, plaintiff Lynch does not allege that he is not permitted visitors other than co-plaintiff Justice. Even if co-plaintiff Justice were the only person on earth willing to visit plaintiff Lynch, defendants would not be required to allow visitation if Justice refused to be searched. Furthermore, plaintiff Lynch has not sought administrative review of the decision to terminate

visitation privileges of plaintiff Justice.

Finally, plaintiff Lynch has no standing to assert a claim of "retaliation" on behalf of co-plaintiff Justice. Accordingly, plaintiff Lynch's due process rights are not implicated by the termination of co-plaintiff Justice's visitation.

COUNT ELEVEN

(First Claim of Cruel and Unusual Punishment)

Count Eleven (First Claim of Cruel and Unusual Punishment) is brought by plaintiff Lynch against all defendants. This is the same claim as asserted in the previous count (Count Ten - Second Due Process Claim). However, in Count Eleven, plaintiff Lynch asserts that by "retaliating" against co-plaintiff Justice the defendants have subjected Lynch to cruel and unusual punishment.

In order to state a cause of action for cruel and unusual punishment, plaintiff Lynch must allege that defendants' conduct amounted to "punishments which, although not physically barbarous, involve the unnecessary and wanton infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392 (1981), citing Gregg v. Georgia, 428 U.S. 153 (1976).

Plaintiff Lynch's assertion that defendants' alleged "retaliatory" conduct against co-plaintiff Justice amounts to cruel and unusual punishment against Lynch is completely without merit. The Supreme Court in Rhodes stated, "No static test can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of

decency that mark the progress of a maturing society." Rhodes, at 347.

In the instant case, plaintiff Lynch has been denied the opportunity to visit with co-plaintiff Justice. Plaintiff Lynch does not assert that he is barred from visiting with other persons. Clearly, plaintiff Lynch's claim is insufficient to state a cause of action for cruel and unusual punishment.

COUNT TWELVE

(Eighth Claim of Retaliation)

Plaintiffs allege that by placing plaintiff Justice on the Permanent Restriction List for visiting the Shawnee Correctional Center, defendant Sandahl is denying plaintiffs Justice and Lynch of the sanity-preserving pleasures of visitation.

The plaintiffs are operating under the mistaken assumption that defendant Sandahl must provide them with

pleasure-filled experiences. Wrong. Defendant Sandahl is obligated to run a correctional center, period. Pursuant to and in accordance with departmental procedure, plaintiff Justice was placed on the Permanent Restriction List for refusing to be searched on prison property. Plaintiff Justice was notified that he may seek review of this decision and apparently (never alleged) has not done so. Plaintiff Justice has no right to visit an incarcerated individual (See Mayo). Thus, defendants' conduct cannot be construed as retaliatory and Count Twelve must fail.

COUNT THIRTEEN

(Second Due Process Claim)

Count Thirteen (Second Due Process Claim) is brought against all defendants by both plaintiffs. (This is not unlike the other second due process claim at par. 38 of Plaintiff's Amended

Complaint). In this claim, plaintiffs assert that the defendants have violated their rights by searching vehicles outside of the Shawnee Correctional Center where inmates do not have unsupervised access to the vehicles.

Although brought by both plaintiffs, this claim is obviously applicable only to plaintiff Justice. Nowhere in the Amended Complaint does plaintiff Lynch assert that he is not subject to search. Therefore, the claim belongs solely to plaintiff Justice. As noted previously, plaintiff Justice admits in the original Complaint that he left rather than submit to having the car searched on June 16, 1990.

As stated ad nauseam, plaintiff Justice has no constitutional right to enter a correctional center in order to visit a prisoner. (See Mayo). Illinois Department of Corrections rules require

that visitors submit to search prior to visiting the facility. See 20 Ill. Admin. 525.60(f). Accordingly, Count Thirteen (plaintiff's second second due process claim) is groundless and must be dismissed.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, defendants request that plaintiff's Amended Complaint be dismissed with prejudice.

Respectfully submitted,

MICHAEL P. LANE, et al., Defendants,

ROLAND W. BURRIS, Attorney General, State of Illinois, Attorney for the Defendants, by (SIGNED) TERRENCE T. ROCK, Assistant Attorney General, 500 South Second Street, Springfield, Illinois 62706, (217)782-1090 Of Counsel.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 90-3764

JOHN C. JUSTICE,

AND

STEVEN T. LYNCH,

Plaintiffs

vs.

Lt. JERRY SUITS, et al.,

Defendants

RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Now come the Plaintiffs, in propriae personae, and in response to the Defendants' Motion to Dismiss Plaintiffs' Amended Complaint state as follows:

IF THE SECURITY OF THE PRISON IS TRULY AN ISSUE AND IF VISITORS' VEHICLES AND THE VEHICLES' CONTENTS REPRESENT A ROUTE FOR THE INTRODUCTION OF CONTRABAND INTO THE PRISON, THE RATIONAL WAY TO ELIMINATE THIS ROUTE IS TO PROHIBIT ACCESS TO

VEHICLES BY GUARDS OR BY VISITORS UNTIL THE VISITORS RE-ENTER THEIR VEHICLES AND DEPART FROM THE PRISON. THE PRIMARY EMPHASIS ON PROHIBITION OF ACCESS TO VEHICLES SHOULD BE PROHIBITION OF ACCESS BY PRISON STAFF, BECAUSE VISITORS ARE THOROUGHLY BODY-SEARCHED, WHEREAS THERE IS A LAXITY OF RIGOR IN SEARCHING PRISON STAFF. PLAINTIFF JUSTICE HAS SEEN PRISON STAFF FREELY ENTER THE PRISON WITHOUT SEARCH AND HAS DEDUCED THAT THE "CONTRABAND PROBLEM" ALLEGED BY PRISON STAFF DERIVES NOT FROM VISITORS, BUT FROM THE STAFF ITSELF.

Defendants' Motion to Dismiss is addressed in rebuttal as follows, to which points are responded sequentially and numbered following the order of the numbered paragraphs of the motion:

1. Plaintiffs filed their amended complaint on or about March 10, 1991.

2. Plaintiffs in their amended

complaint contest the propriety of warrantless searches without reasonable suspicion of visitors' vehicles outside the confines of the prison, which vehicles never enter the confines of the prison and are not accessible to inmates.

The interest of visitors to be free from unreasonable searches, grounded as it is in the Fourth Amendment is plainly a "liberty" interest within the meaning of the Fourteenth Amendment. It also arises as a protected liberty interest from Article I § 6 of the Constitution of the State of Illinois. As such it is protected from arbitrary governmental invasion.

In the case of McDonell v. Hunter, 746 F.2d 785 (8th Cir. 1984), it was held by the Court in an appeal from the granting of a preliminary injunction that,

"..the district court did not abuse its discretion in granting a

preliminary injunction .... prohibiting the warrantless searches of employee's automobiles parked outside the confines of the facility."

McDonell v. Hunter, 746 F.2d 785 (8th Cir. 1984), on decision in the District Court, 612 F.Supp. 1122 (D.C. Iowa 1985) following the affirmation of the preliminary injunction in the Court of Appeals for the Eighth Circuit, held that

"..it is unreasonable to search employees' automobile parked outside confines within which inmates are kept, even if parking lot is on ground owned by correctional facility;..."

On appeal from that decision, the Court of Appeals again held, McDonell v. Hunter, 809 F.2d 1302 at 1309 (8th Cir. 1987), that

"Correctional officials can search

employees' vehicles parked outside institution's confines if it can be shown that inmates have unsupervised access to those vehicles, or upon showing of reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that vehicle to be searched contains contraband."

None of circumstances under which searches would be reasonable under McDonell pertains to visitors arriving at Shawnee Correctional Center for visits with friends or relatives.

Visitors' vehicles are parked in areas outside the confines of the Shawnee Correctional Center, and inmates do not have unsupervised access to visitors' vehicles.

The issue of searches of vehicles of visitors to inmates of State prisons

should require more rigorous adherence to the Fourth Amendment than for employees of institutions, who as a condition of employment contract may be forced to waive the rights retained by citizens. Even under those circumstances, where employees had signed advance consent to future unreasonable searches, such searches were held to be not permissible.

> "If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment. (Citations omitted here.) ... The state may only use a consent form which delineates the rights of the employees consistent with the views of this opinion and which does not require the waiver of those rights." McDonell v. Hunter, 809 F.2d 1302 at 1310 (8th Cir. 1987)

The Illinois Department of Correction

Rules (Exhibits E and F) do not allow for any expectation of privacy. Failure to submit to search of a vehicle, body search, or strip search is, according to the Rules, grounds for denial, suspension, or restriction of visiting privileges. As they are formulated, the Rules are contrary to current case law:

> "[8] Correctional facility security considerations reduce the scope of reasonable expectations of privacy that one normally holds and makes reasonable some intrusions that would not be reasonable outside the facility. However, security considerations do not cause prisoners to lose all of their constitutional rights at the prison gates. Bell v. Wolfish, 411 U.S. 520, 558-59 (1979); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Visitors do not lose all of their Fourth Amendment rights

at the prison gates. Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982). And prison employees do not lose all of their Fourth Amendment rights at the prison gates. Armstrong v. New York State Commissioner of Correction, 545 F.Supp. 728, 730 (N.D.N.Y. 1982)." (Emphasis in the original.) McDonell v. Hunter, 612 F.Supp. 1122, 1128 (D.C.Iowa 1985)

A. The security of the prison is not at issue in the searches of vehicles of visitors to the Family Picnic at Shawnee Correctional Center:

a. Each visitor is instructed to leave all personal property other than clothing including engagement

and wedding rings in their vehicles. Commissary coupons which can be used to purchase family photographs must be purchased before entering the prison, so there is not even any money taken into the prison in contrast to ordinary visits when there is a small amount of money admissible for use in the coin-operated food and cigarette machines in the visiting room.

b. Each visitor is given a body search to reduce the

possibility of any contraband's being brought into the prison by visitors. This is the search which limits the bringing of contraband into the prison; the unreasonable search of vehicles of which Plaintiffs complain does not include a body or possessions search. All manner of contraband could be secreted upon the person of visitors while the search of the vehicles is conducted prior to their parking the

vehicles. It can then be replaced in the vehicle by the person parking the vehicle.

3. The Defendants allege that Plaintiff Justice has no liberty or property interest in visiting an inmate at the Shawnee Correctional Center. The Plaintiffs are <u>not</u> litigating this issue. The issue at bar is the unreasonable search of vehicles outside the confines of the prison.

4. Plaintiff Justice is not litigating this issue.

5. Plaintiffs' Amended Complaint alleges the personal involvement of Defendant McGinnis in the deprivation of Constitutionally protected rights.

A. Defendant McGinnis was given notice of Defendant Sandahl's retaliation against Plaintiff Justice

for having asserted a Constitutional right; neither Defendant McGinnis nor Defendant Sandahl responded to Plaintiff Justice's letter to Defendant Sandahl, although both received copies of the letter. (Exhibit D.)

"'Under section 1983, equitable relief is appropriate in a situation where government officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct. From a legal standpoint, it makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior. In either situation, if

the police officials had a duty, as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred, ... they are the proper defendants in this action.' Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969)." Quoted in Roe v. Borup, 500 F.Supp. 127, 132 (E.D.Wis. 1980)

Defendant McGinnis, when informed of the retaliation of Defendant Sandahl for Plaintiff Justice's assertion of a Constitutional right, had a duty to the Plaintiffs to correct the wanton, willful, malicious acts of his employee.

"...the section 1983 language 'subjects, or causes to be subjected' is broader than direct personal involvement; it includes failure to perform a duty if that failure causes deprivation of protected rights."

(Citations omitted.) McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979)

"It is not necessary for § 1983 liability that the appellees directed any particular action with respect to these specific individuals, only that they affirmatively promoted a policy which sanctioned the type of action which caused the violations. In short this is not a case of indifference, that is a failure to act in the face of misconduct by subordinates, but is rather a case of affirmative policy-making which may have caused the misconduct. Cf. Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)." (Emphasis in the original.) Duchesne v. Sugarman, 566 F.2d 817, 831 (2nd

Cir. 1977)

6. Defendants' memorandum of law is addressed in rebuttal as follows, to which points are responded sequentially and numbered following the order of the un-numbered paragraphs of the memorandum:

7. In addition to asserting claims under 42 U.S.C. 1983, the Plaintiffs alleged jurisdiction as follows:

> This Court has jurisdiction to hear this case under 28 U.S.C. § 1343. The relief demanded for Declaratory Judgment finds jurisdiction in this Court under 28 U.S.C. §§ 2201 and 2202. If either Plaintiff lacks standing to bring this cause under 42 U.S.C. § 1983, this Court has jurisdiction to hear his complaint under 28 U.S.C. § 1331.

8. In addition to the facts interpreted by the Defendants, which do

not include responses to allegations of wrongdoing in two instances alleged by Plaintiff Justice which occurred in June of 1989, and on May 13, 1990, other facts apply:

Plaintiff Justice attended two Family Picnics in the summer of 1988 (in one of which he was unable to participate because he arrived, as did other visitors, five minutes after the noon cutoff) at which no general warrantless searches of visitors' vehicles were made. This is, then, a new policy that was begun between 1988 and 1989.

9. Defendants assert that,

> "It should be noted that although the Amended Complaint is brought by both Lynch and Justice, the only conduct complained about regards the attempt of Mr. Justice (a free man) to enter the Shawnee Correctional Center."

The only conduct complained about regards warrantless general searches conducted outside the confines of the prison without reasonable suspicion, retaliation for asserting a Constitutional right, and the consequences to the plaintiffs resulting from the searches and retaliation.

ARGUMENT

10. Defendants allege that no personal involvement of Lane and Sandahl was alleged in Count One. Sandahl was in direct supervision of the prison at the time of the search complained of; Rich was the internal security officer immediately responsible for instituting security measures which include the searches complained of.

If Defendants Childs, Suits, and Freedman were not acting under the direction of Defendant Sandahl, their acts were not authorized under Warden's

Bulletin #05.01.106.20 of September 1, 1990:

"6. Restriction of Visitors

e. The Chief Administrative Officer or his designee may deny, suspend or restrict visiting privileges based, among other matters, upon the following:"

(Here follows a list.)

Defendant Sandahl should not be dismissed as uninvolved in Count One because of his obvious involvement in retaliation against Plaintiff Justice for having asserted a Constitutional right. (Exhibit D.) Defendant Rich, because he is responsible for instituting security measures which include the searches complained of, should not be dismissed.

As to the culpability of Defendant Lane, discovery has not been conducted with regard to his personal knowledge and involvement; he should remain a Defendant until discovery is completed.

11. Plaintiff Justice's allegation that a search took place in paragraphs 4. & 5. of the Amended Complaint is an allegation of an event that took place a year before the events that are complained of in the original Complaint. The fact that the search took place on State property makes it no less unreasonable. The Defendants are not conducting general strip searches of all visitors, perhaps because there is case law directed to that issue:

> "Lest there be any doubt, we state here that 'reasonable suspicion' must be directed to the person to be searched." United States v. Afanador, 567 F.2d 1325,

1331 (5th Cir. 1978)

The same logic that applies to two Defendants in Afanador applies to the four hundred vehicles that preceded Plaintiff Justice's.

> "...a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement can not be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth

and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places." Ybarra v. Illinois, 444 U.S. 85, 91 (1979)

"An investigatory search will be found constitutionally permissible only when supported by reasonable suspicion directed to the person to be searched..." United States v. Clay, 640 F.2d 157, 160 (8th Cir. 1981)

12. The Rules at 20 Ill. Adm. 525.60(f) and Rule 3) thereunder state that

f) "Any of the following actions on the part of a visitor may result in a temporary restriction of up to six months:

3) Refusal to submit to a search."

Here the Defendants fail to distinguish between searches necessary to protect the

security of the prison and searches that clearly are beyond the standard of reasonableness. Under Rule f)3) any search that is denied is grounds for denial of a restriction of up to six months. A general strip search of all visitors would be within the reading of the Rule. The Plaintiffs have never complained of and recognize the reasonableness of the body search conducted on each visitor after entering the confines of the prison. Plaintiff Justice has not refused "a search"; he refused an unreasonable search that would have preceded a search. The fact that his vehicle <u>was</u> searched over his objection on two occasions prior to the crucial demand which initiated this Complaint would have alerted any visitor with an IQ above zero that any personal property colorable as contraband would result in confiscation and arrest. His

objection to Defendant Suits (Amended Complaint, par. 14.) would have satisfied Plaintiff Justice, but Defendant Suits responded to the objection with, "The Constitution's got nothing to do with it: we're demanding that you give us your permission to search your car."

It is also notable that Defendant Sandahl exceeded his authority under Rule f) by permanently restricting Plaintiff Justice from "visiting at the Shawnee Correctional Center as well as all correctional facilities within the Adult Division of the Department of Corrections." Rule f), quoted above, authorizes only temporary restrictions. (Amended Complaint, par. 25)

13. In Elizabeth Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989), Mayo claimed a right to visit which does not exist under Illinois Revised Statutes, Ch. 38, par. 1003-7-2(f). Had Mayo claimed the right

under Article I § 1 of the Constitution of the State of Illinois, the Seventh Circuit might have viewed the case in agreement with Mayo. Had Miranda, of Miranda v. Arizona fame, complained that his rights under the Third Amendment had been violated, his case would never have been granted certiorari.

The Seventh Circuit has clearly said that there is no right for a free person to visit an incarcerated person. Assuming arguendo that from time to time the privilege to visit may be granted, do the Defendants have the right to unreasonably search each and every visitor? The Plaintiffs are not litigating the right to visit, although Plaintiff Justice sincerely believes that the liberty interest "created" in Article I § 1 of the Illinois Constitution, which existed since the Declaration of Independence and perhaps

since Magna Charta, affirms such a right, absent any positive law restricting it. His sincere belief does not affect the opinion of the Seventh Circuit, and consideration of his belief or the opinion of the Seventh Circuit is not sought here. The Plaintiffs <u>are litigating the issue of unreasonable searches</u> among other issues in their Amended Complaint.

COUNT TWO OF PLAINTIFFS' AMENDED COMPLAINT

14. In par. 29 of the Amended Complaint, Defendants David G. Sandahl, Gary Rich, Kenneth L. McGinnis, and Unknown Employees of Shawnee Correctional Center are alleged to have been involved in the second violations of rights secured under the Fourth Amendment and Article I § 6 of the Illinois Constitution. This incident, which occurred on May 13, 1990, was cited in Defendant Sandahl's letter of June 27,

1990, in which he retaliated against Plaintiffs for Justice's having asserted a Constitutional right.

> "Any act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) quoted in Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978) See also Matzker v. Herr 748 F.2d 1142, 1150-51 (7th Cir. 1984)

Defendant McGinnis was informed by Justice's letter of September 7, 1990, of Justice's assertion that his rights secured under the Fourth Amendment and Article I § 6 of the Illinois Constitution had been violated, and he did nothing about it.

> "`Under section 1983, equitable

relief is appropriate in a situation where government officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct. From a legal standpoint, it makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior. In either situation, if the police officials had a duty, as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred, ... they are the proper defendants in this action.' Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969)."

Quoted in Roe v. Borup, 500 F.Supp. 127, 132 (E.D.Wis. 1980)

Defendant Rich, because he is responsible for instituting security measures which include the searches complained of, should not be dismissed.

COUNT THREE

15. Defendants assert that Plaintiff Justice must allege that he has a Constitutional right to enter the correctional center without being searched in order to state a cause of action for retaliation. As stated before, the Plaintiffs are not arguing that visitors should not be searched, and Justice having visited Lynch in a long series of uncontested visits, both Plaintiffs and Defendants are, or should be, aware that each and every visitor is body-searched before a visit. The searches at issue are the unreasonable searches of visitors' vehicles which are

parked outside the confines of the prison, in plain view of two guard towers, not subject to unsupervised access by inmates.

The Plaintiffs have stated a cause of action against Defendant Childs because

> "Any act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) quoted in Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978) See also Matzker v. Herr 748 F.2d 1142, 1150-51 (7th Cir. 1984)

COUNT FOUR

The Defendants again assert Mayo as a defense against the charge of retaliation against Defendant Suits. Defendant Suits as alleged in par. 17. of the Amended

Complaint retaliated against Plaintiff Justice for having asserted a Constitutional right. The Plaintiffs have stated a cause of action against Suits because

> "Any act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) quoted in Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978) See also Matzker v. Herr 748 F.2d 1142, 1150-51 (7th Cir. 1984)

COUNT FIVE

16. Plaintiffs' Third Claim of Retaliation alleges that Defendant Pfc. D.R. Friedman knew or should have known that he lacked jurisdiction to order a private citizen to submit to a search

without probable cause or without reasonable suspicion, and that Defendant Friedman retaliated against Plaintiff Justice for having asserted a Constitutional right. Defendant Friedman was fully informed as to the issues before he concluded that Plaintiff Justice must submit to a search to which Justice had objected. Defendant Friedman, rather than uphold Justice's right to be free from unreasonable search, chose to retaliate against the Plaintiff by ordering him to leave or be arrested.

> "Any act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) quoted in Buise v. Hudkins,

584 F.2d 223, 229 (7th Cir. 1978) See also Matzker v. Herr 748 F.2d 1142, 1150-51 (7th Cir. 1984)

COUNT SIX

17. Defendants assert that Plaintiffs' Fourth Claim of Retaliation is ludicrous. The Defendants are trying to obscure the issues. Plaintiffs are not arguing and have not argued the unreasonableness of the body search conducted on each visitor after entering the confines of the prison. Plaintiff Justice has not refused "a search"; he refused an unreasonable search that would have preceded a search that would have taken place on entering the building. The conclusions of Mayo are not relevant to this case.

The Defendants readily admit that Plaintiff Justice's visiting "privileges" were terminated with the consequent violations of Plaintiff Lynch's secured

rights and liberty interests. Defendant Sandahl retaliated against Plaintiff Justice by terminating Justice's visiting "privileges" not only for having asserted a Constitution right for which Defendants Childs, Suits, and Friedman directly barred him from a visit, but also for having asserted the same right on an earlier date, at which time a search of his vehicle was conducted over his objection!!

> "Any act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) quoted in Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978) See also Matzker v. Herr 748 F.2d 1142, 1150-51 (7th Cir. 1984)

Mt. Healthy City Board of Education v. Doyle is quoted with approval in Freeman v. Blair, 793 F.2d 166, 178 (8th Cir. 1986) where the Court concludes its opinion, at 179, by saying,

> "Although this case involves the assertion of a Fourth Amendment right rather than one under the First Amendment, the principle is the same. It is so deeply embedded in the legal and social fabric of our society that no high-level government official could fail to know of it." Freeman v. Blair, 793 F.2d 166, 178 (8th Cir. 1986)

18. Defendants allege that, "Nowhere in plaintiffs' Amended Complaint is there any indication that administrative review of this decision has been sought." Immediately following par. 25 of the Amended Complaint, in par. 26, is a quotation from Justice's letter of

September 7, 1990, (Exhibit D.) which said in pertinent part,

> "Prior to taking any other action with regard to the denial of a visit on the occasion of the June 16, 1990, picnic because of my refusal to waive my rights under the Fourth Amendment to the Constitution for the United States and Article I Section 6 of the Constitution of the State of Illinois I wish to know if there are any administrative procedures which afford a remedy to me.

Although Justice sought an administrative remedy, none is required prior to asserting a claim under Title 42 § 1983.

> "Beginning with McNeese v. Board of Education, 373 U.S. 668, 671-673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the

plaintiff has not exhausted state administrative remedies. [Citations omitted.] ('[W]hen federal claims are premised on [§ 1983]--as they are here--we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights'). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since McNeese. Therefore, we do not address the question presented in this case as one of first

impression." Patsy v. Bd. of Regents, 457 U.S. 496, 73 L.Ed.2d 172 at 177, 102 S.Ct. 2557 (1982)

COUNT SEVEN

19. The rebuttal of Defendants' arguments under this heading is the same as in the preceding paragraph under Count Six. The only new issue addressed is the question as to whether Plaintiff Justice should have sought review of the denial of visitation after six months as offered in Defendant Sandahl's letter of June 27, 1990. In view of the Defendants' adamant position of rectitude, and the lack of response from Defendants McGinnis and Sandahl to Justice's letter of September 7, 1990, in which administrative remedies prior to filing this suit were sought, no resolution outside this Court could be anticipated. Plaintiff Justice does not accept renewal of visiting "privileges" with unreasonable searches of his vehicle

as a condition precedent to a visit.

COUNT EIGHT

20. As to the culpability of Defendant Lane, discovery has not been conducted with regard to his personal knowledge and involvement; he should remain a Defendant until discovery is completed.

The Rules at 20 Ill. Adm. 525.60(f) and Rule 3) thereunder were promulgated by Defendant Lane and adapted directly by Defendants Rich, Sandahl, and Unknown Defendants without consideration of the requirement of reasonableness in searches of visitors. The provision for strip searches in the Rules violates the standard in Afanador:

> "Lest there be any doubt, we state here that 'reasonable suspicion' must be directed to the person to be searched." United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir. 1978)

The same restrictions as to individualized suspicion in vehicle searches have been addressed in McDonell v. Hunter, 746 F.2d 785 (8th Cir. 1984), McDonell v. Hunter, 612 F.Supp. 1122 (D.C. Iowa 1985), and McDonell v. Hunter, 809 F.2d 1302 at 1309 (8th Cir. 1987), and are applicable here.

If the policies set forth in the Rules are the sole responsibility of Defendant Lane, he may be held liable. Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1970). If he failed to train and supervise his subordinates, that may establish his liability. Jones v. Evans, 544 F.Supp. 769 (N.D.Ga. 1982); O'Connor v. Keller, 510 F.Supp. 1359 (D. Md. 1981)

COUNT NINE

21. Defendant McGinnis was informed of the retaliation of Defendant Sandahl by a copy of Justice's letter of September 7, 1990, to Sandahl, by Certified Mail,

Return Receipt requested, of Justice's assertion that his rights secured under the Fourth Amendment and Article I § 6 of the Illinois Constitution had been violated, and he did nothing about it.

> "`Under section 1983, equitable relief is appropriate in a situation where government officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct. From a legal standpoint, it makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior. In either situation, if the police officials had a duty, as they admittedly had here, to prevent

the officers under their direction from committing the acts which are alleged to have occurred, ... they are the proper defendants in this action.' Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969)."

Quoted in Roe v. Borup, 500 F.Supp. 127, 132 (E.D.Wis. 1980)

"Plaintiff has alleged that Franzen personally approved of and ratified the conduct of the other defendants. That is sufficient to state a claim under Section 1983. Franzen may be able to show that he had no personal knowledge of the other defendants' actions. However, if plaintiff proves the allegations of his complaint, defendant Franzen will be liable. Accordingly, the court finds that plaintiff has stated a claim against Franzen as well. See Duncan, 644 F.2d at 654-655." Vaughn v. Franzen,

549 F.Supp. 426, 427 (N.D.Ill.E.D. 1982)

COUNT TEN

22. Plaintiffs' First Claim of Deprivation of Rights without Due Process alleged that,

> "Plaintiff Justice has protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Defendants, each and severally, acting under color of State Law. This conduct deprived Plaintiff Lynch of rights secured by the Constitution of the United States."

Plaintiff Justice has a liberty interest secured under the Fourth Amendment to the Constitution for the United States and by

the 1970 Constitution of the State of Illinois, Article I, § 6:

"Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 6 of the Constitution of the State of Illinois is even more restrictive than its federal counterpart:

"§ 6. **Searches, Seizures, Privacy and Interceptions**

"The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches,

seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." (Emphasis added.)

The Plaintiffs have the right to preserve whatever liberties they enjoy; to fail to assert and exercise those liberties is assumed to be a waiver of them by those who would establish tyranny.

The fact that Elizabeth Mayo [Elizabeth Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989)], claimed a right to visit under Illinois Revised Statutes, Ch. 38, par. 1003-7-2(f), does not affect Plaintiff Justice's liberty interest established under Article I § 6 of the Constitution of the State of Illinois.

"...an individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests may arise from two sources--the Due Process Clause itself and the laws of the States.' Hewitt v. Helms, 459 U.S., at 466" Ky. Department of Corrections v. Thompson, 490 U.S. _ , 104 L.Ed.2d 506, 514 (1989)

Accordingly, Plaintiffs' First Claim of Deprivation of Rights without Due Process should not be dismissed because Plaintiff Justice has liberty interests which have been deprived under color of State law, and the conduct of the Defendants deprived Plaintiff Lynch of rights secured by the Constitution of the United States.

COUNT TEN

23. In Plaintiffs' Second Claim of Deprivation of Rights without Due

Process, Plaintiffs allege that Defendants have deprived Plaintiff Lynch of liberty and property without due process by retaliating against Plaintiff Justice for having asserted a Constitutional right. Plaintiff Lynch has a liberty interest secured under Illinois Revised Statutes, Ch. 38, par. 1003-7-2(f), as has been recognized by the Defendants in their Memorandum of Law in Support of Defendants' Motion to Dismiss [Plaintiffs' Motion for a Temporary Restraining Order] filed December 21, 1989. The statute, Illinois Revised Statutes, Ch. 38, par. 1003-7-2(f) states,

> "All of the institutions and facilities of the Department shall permit every committed person to receive visitors, except in case of abuse of the visiting privilege or when the chief administrative

officer determines that such visiting would be harmful or dangerous to the security, safety, or morale of the institution or facility."

The language of the statute creates the liberty interest:

"By using the mandatory term `shall,' the provision makes plain prison officials must permit inmates to receive visitors except when two enumerated conditions--conditions that constitute `objective and defined criteria' in the sense employed in Olim [Olim v. Wakinekona, 461 U.S. 238, 249 (1983)]--are met (cf. Hewitt v. Helms, 459 U.S. 471-72, 103 S.Ct. at 871) U.S. ex rel. Adams v. O'Leary, 659 F.Supp. 736, 739 (N.D.Ill. 1987).

In as much as Plaintiff Lynch has had no visitors during the period since Plaintiff Justice began visiting him

except visitors whom Plaintiff Justice brought, denial of visitation to Plaintiff Justice is a denial of the right to receive visitors for Plaintiff Lynch. To say that he may receive visitors who never appear is itself a tauntingly cruel and unusual punishment. Defendants assert that,

> "Even if co-plaintiff Justice were the only person on earth willing to visit plaintiff Lynch, defendants would not be required to allow visitation if Justice refused to be searched."

Plaintiff Justice has not refused to be searched; he has objected to an unreasonable search outside the confines of the prison, which had no relationship to the security of the prison, because each and every visitor <u>is</u> body-searched after entering the confines of the prison.

Plaintiff Lynch's due process rights are, de facto, implicated by the termination of Plaintiff Justice's visitation.

COUNT ELEVEN

24. In Plaintiffs' First Claim of Infliction of Cruel and Unusual Punishment, Plaintiffs allege that,

> "in depriving Plaintiff Lynch of liberty and property without due process of law have inflicted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution for the United States as applied to the State under the Fourteenth Amendment to the Constitution for the United States, as a result of their having retaliated against Plaintiff Justice for having asserted a Constitutional right. Plaintiff Lynch has protected liberty interests secured under

Illinois law and the Constitutions of the State of Illinois and the United States of which he has been deprived without due process of law. The conduct complained of was committed by the Defendants, each and severally, acting under color of State Law. This conduct deprived Plaintiff Lynch of rights secured by the Constitution of the United States."

Defendants aver that,

"In order to state a cause of action for cruel and unusual punishment, plaintiff Lynch must allege that defendants' conduct amounted to 'punishments which, although not physically barbarous, involve the unnecessary and wanton infliction of pain.' Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392 (1981), citing Gregg v. Georgia, 428 U.S. 153

(1976)."

The conditions of life under the terms that must be accepted when one is imprisoned are such that any condition that makes the imprisonment less tolerable, particularly as in this case where the cause is unnecessary, wanton, willful, and malicious, results in the infliction of pain.

> "No static test can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Rhodes v. Chapman, 452 U.S. 337 at 347, 101 S.Ct. 2392 (1981)."

as quoted by the Defendants can be quoted with approbation by the Plaintiffs also.

The Plaintiffs cannot allege that the

treatment accorded them resulted in pain that produced effects the admission of which would be humiliating, or that sessions with a psychologist or psychiatrist were necessitated as a consequence. They were wronged, and rather than take their anger and frustration out in ways that would be socially unacceptable, they have brought the issue to this Court for resolution by a jury.

Plaintiff Lynch does not assert that he is barred from visiting with other persons; at the present time, there aren't any.

COUNT TWELVE

25. There is no assumption on the part of the Plaintiffs that Defendant "Sandahl must provide them with pleasure-filled experiences." If "Defendant Sandahl is obligated to run a correctional center, period," what functions should a

correctional center have other than chaining prisoners to a wall, throwing them a slice of bread a day, and hosing them down once a week to keep the odor to a tolerable level? Why have such "pleasure-filled experiences" as picnics, or visitation, at all? If Defendant Sandahl ordered general strip-searches-with-cavity-exploration would one-percent of the visitors join Plaintiff Justice in refusing an unreasonable search, and be "placed on the Permanent Restriction List for refusing to be searched on prison property"? Would seeking review six months after having been placed on the Permanent Restriction List have any result other than "you must submit to any unreasonable search that we demand"? Plaintiff Justice has liberty interests that were not claimed by Elizabeth Mayo. Defendants clearly retaliated against an individual who asserted a Constitutional

right. Both Defendants and Plaintiff Justice are aware that a search which would have excluded contraband from the prison would have been conducted on Plaintiff Justice on entering the confines of the prison. Defendants refusal to accept an objection, preferring an absolute waiver of objection which would have obviated this suit (Amended Complaint, par. 15), is the root cause of this suit. "Visitors do not lose all of their Fourth Amendment rights at the prison gates." Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982). And the searches complained of took place outside the prison gates.

COUNT THIRTEEN

26. In Plaintiffs' Second Claim of Deprivation of Rights without Due Process, Plaintiffs alleged that,

"Defendant Gary Rich knew or should have known that in designing security

procedures he was wantonly, wilfully and maliciously violating the rights of citizens when he instituted and/or continued searches of citizens' vehicles outside the confines of Shawnee Correctional Center where inmates do not have unsupervised access to the vehicles, and Defendants Unknown Employees of Shawnee Correctional Center, Judson Childs, Jerry Suits, Gary Rich, David G. Sandahl, D.R. Friedman, Michael P. Lane, and Kenneth L. McGinnis, knew or should have known that they were wantonly, wilfully and maliciously violating the rights of citizens when they searched or allowed searches of citizens' vehicles outside the confines of Shawnee Correctional Center where inmates do not have unsupervised access to the vehicles. Visitors have a protected liberty

interest to be free from unreasonable searches protected from arbitrary governmental invasion. The Defendants, each and severally, if they are reasonably prudent men, knew or should have known that their acts violate due process. Plaintiffs Justice and Lynch have protected liberty interests secured under Illinois law and the Constitutions of the State of Illinois and the United States of which they have been deprived without due process of law. The conduct complained of was committed by Defendant Rich acting under color of State Law. This conduct deprived Plaintiffs Justice and Lynch of rights secured by the Constitution of the United States."

The Defendants state that "plaintiff Justice admits in the original complaint that he left rather than submit to having

the car searched on June 16, 1990." Plaintiff Justice left because Defendants Childs, Suits, and Freedman would not accept his objection to an unreasonable search, Defendants demanded that he permit them to search--waiving any objection--, and each of the prison staff Defendants retaliated by excluding Justice for having asserted a Constitutional right. Defendants are obviously entrapping disingenuous visitors, such as the four "criminals" in whose vehicles "contraband" was found on June 16, 1990, (according to the testimony of Defendant Rich on December 21, 1990,) by precluding a motion to suppress should the "criminals" choose to go to trial to defend themselves, because the "criminals" would have given permission for the search.

If, accepting arguendo as asserted by the Defendants "ad nauseam, plaintiff

Justice has no constitutional right to enter a correctional center in order to visit a prisoner," do the Illinois Department of Corrections rules supercede the Constitution? Is every search constitutional, no matter how unreasonable, no matter how infantile in concept it may be as directed toward a perceived goal of protecting the security of the prison, no matter that it duplicates a succeeding search which is the search that actually limits the introduction of contraband (if that contraband in fact is brought in by visitors)?

CONCLUSION

Plaintiff Justice has reviewed the cases cited in the current Rules for the Department of Correction, and has found nothing there which would, as the notes to the rules allege, have allowed the searches complained of, in accord with

consent decrees entered into by the Defendants in those cases.

Based upon analogy to the reasoning in the three reported cases of McDonell v. Hunter, the plaintiffs have every reason to object to and to contest the propriety of the search procedures conducted regarding visitors' vehicles outside the confines of the Shawnee Correctional Center.

The Attorney General alleges that Plaintiff Justice lacks standing to assert a right. As a member of that constituency whose forefathers formed the government of the United States and set forth the principles which they, and he, intended to establish and preserve in the Preamble to the Constitution,

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the

common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America,"

he has and intends to preserve those rights.

"Liberty" is defined in Black's Law Dictionary, Fifth Edition, West Publishing Company, St. Paul, Minnesota, 1979, as,

"Freedom; exemption from extraneous control. Freedom from all restraints except such as are justly imposed by law. Freedom from restraint, under conditions essential to the equal enjoyment of the same right by others; freedom regulated by law. The absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed

in the interests of the community." Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P.2d 779, 785.

"The power of the will to follow the dictates of its unrestricted choice, and to direct the external acts of the individual without restraint, coercion, or control from other persons." See Booth v. Illinois, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623; Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77.

Such definitions continue for two full pages of fine print, to which the Attorney General may well be advised to refer, if not defer.

The Attorney General is trying to change this case from a case stating causes of action based upon clear violations of rights under the Fourth, Eighth and Fourteenth Amendments to one which has not been pleaded, viz., a cause

of action for denial of visitation on the part of Plaintiff Justice.

WHEREFORE, Plaintiffs, for the foregoing reasons, pray this Honorable Court deny the State's Motion to Dismiss Plaintiffs' Amended Complaint.

Respectfully submitted,

(SIGNED)

John C. Justice
1801 S. 55th Avenue
Cicero, Illinois 60650
708-656-3250

(SIGNED)

Steven T. Lynch N-04276
Box 300
Shawnee Correctional Center
Vienna, Illinois 62995
618-658-8331

Section 501.220 Searches for Contraband

a) Searches of Visitors

1) All persons, vehicles and items brought onto State property are subject to search. Prominent notice to this effect shall be posted at each facility.

2) A body search of a visitor shall be conducted in an area offering the visitor some degree of privacy.

3) A strip search of a visitor may be conducted by a correctional employee only upon the consent of the visitor and in accordance with the following provisions:

A) Department personnel must first have a reasonable suspicion that the visitor may be in possession of

contraband or be attempting to transport contraband into the facility.

B) The visitor shall be informed that he may refuse to submit to the search by Department personnel and may be denied the visit unless he specifically consents in writing to a strip search.

C) The search shall be conducted by an employee of the same sex in an area where the search cannot be observed by persons not conducting the search.

4) Visitors shall not be subject to anal or vaginal cavity searches by correctional personnel.

5) A search of a visitor may be conducted with the assistance of a detector dog.

6) A visitor may refuse to submit to a search. However, failure to submit to a search may result in denial, suspension or restriction of visiting privileges.

b) Searches of Committed Persons

1) All committed persons and their clothing, property, housing and work assignments are subject to search at any time.

Shawnee Correctional Center / P. O. Box 400, HWY. 146E / Vienna, IL 62995 / Telephone (618) 658-8331

M E M O R A N D U M WARDEN'S BULLETIN #05.01.106.20

SUPERSEDES WARDEN'S BULLETIN #05.01.106.20 DATED FEBRUARY 22, 1989

DATE: September 1, 1990

TO: ALL INMATES

FROM: David G. Sandahl, Warden

SUBJECT: Inmate Visiting Privileges

Visiting privileges at the Shawnee Correctional Center are intended to emphasize and maximize contact with the inmate's family, relatives, friends and others concerned with the overall program of the individual inmate. Such communication is essential to the rehabilitation process in terms of morales, maintenance of family ties, and reintegration into the community. Guidelines are as follows:

NOTE: Because of the minimum security nature of the Hardin County Work Camp, many variations exist between the visiting rules at the work camp and the main facility. Both the work camp and the main facility shall abide the following established rules unless a difference is noted for the work camp.

1. Visiting hours and frequency are established as follows:

a. Shawnee Correctional Center

(1) Visiting hours are from 9:00 A.M. to 6:00 P.M. each day.

(2) No visitors shall be admitted after 5:00 P.M.

(3) Visitors may visit once during weekdays (Monday-Friday) and on weekends and approved state holidays.

(4) Normally visits may last all day; however, time restrictions may be warranted if space is not available.

b. Hardin County Work Camp

(1) Visiting hours are from 8:00 A.M. to 6:00 P.M. on weekdays and from 8:00 A.M. to 9:00 P.M. on weekends and holidays.

(2) Visiting is permitted and preferred on weekends and holidays. Visiting through the week (Monday-Friday) is limited to one day (and should not interfere with school or work assignment).

2. General Provisions

a. Visitors must park in designated areas and lock their vehicles.

b. only four (4) persons (not including children) may visit an inmate at one time.

(1) Six (6) persons (not including children) may visit an inmate at the work camp.

c. Visitation rules are posted in the Visiting Room for the availability to visitors and inmates.

d. Visits for inmates housed in the Health Care or Segregation Units at the main facility are governed by page 10 of this Bulletin.

e. Visitors who travel great distances to visit a committed person may request extended visits. These requests must be submitted in advance to the Chief Administrative officer or his designee, and are governed by page 11 of this Wardens Bulletin.

f. Inmates are allowed to briefly embrace their visitors at the beginning and at the end of the visit. Visits may be terminated in cases where inappropriate conduct occurs.

9. All visitors must have proper identification with them before they are allowed to visit unless otherwise

authorized by the Shift Commander or Duty Administrative officer.

3. Accessibility of the Facility

a. The Shawnee Correctional Center is within access of public transportation. Bus service is available to transport visitors to the City of Vienna. Arrangements are made on an as-needed basis to transport visitors from the bus station or hotel/motel in Vienna to and from the Shawnee Correctional Center.

(1) The Shawnee Correctional Center is located near Interstate 24 on Route 146 approximately six (6) miles east of Vienna.

(2) The Hardin County Work Camp is located on Route I approximately one (1) mile west of Cave-in-Rock.

4. Maintenance of a Visiting List

a. A visiting list for each inmate shall be maintained In the Gatehouse at

the main facility and in the Administration Building at the Work Camp.

b. Information regarding each individual approved to visit an inmate shall be recorded on the visiting card at the time of his/her visit.

C. Upon an individual's initial visit to the facility, he/she shall be required to complete a visiting questionnaire prior to being allowed to visit.

(1) The completed questionnaire shall be forwarded to the Chief of Security for his review and approval.

(2) Following review by the Chief of Security, the questionnaire shall be forwarded to the Record Office for inclusion in the inmate's Master File.

5. Admissions of Visitors

a. Department staff may interview or request background information from potential visitors to determine whether the individual would pose a threat to the security or safety of the facility staff, committed persons or other persons.

b. Persons twelve (12) years of age or older must be on an approved list in order to visit.

(1) A person twelve (12) years through sixteen (16) years of age who is not a member of the committed persons' immediate family may be on the approved list only with the written consent of his parent or guardian. Immediate family shall include children, brothers, sisters, grandchildren, whether step, adopted, half, or whole, and spouses.

(2) When visiting, persons under the age of seventeen (17) years must be accompanied by a person who is seventeen (17) years of age or older and who is an

approved visitor ' unless prior written approval has been granted by the Chief Administrative officer or his designee.

C. Persons under twelve (12) years of age need not be on the approved list. However, such persons may visit only:

(1) When accompanied by a parent or guardian who is an approved visitor;

(2) When prior written consent has been given by a parent or guardian who is in the free community for the child to visit when accompanied by the person(s) designated in writing who is an approved visitor and who is at least seventeen (17) years of age; or

(3) As otherwise approved by the Chief Administrative officer or his designee.

d. In determining whether an

exception shall be granted, the Chief Administrative Officer may consider, among other factors, the person's age, emancipation and relationship to the committed person, whether a legal guardian has been appointed for the person, the inability of an approved visitor to accompany the person, and any applicable court order.

e. A person on parole or supervised release or an ex-offender may visit a committed person only with the Written approval of the Chief Administrative officer.

f. The visiting list of a committed person may be amended at any time by the Chief Administrative officer or his designee.

6. Restriction of Visitors

a. The frequency and duration of visits may be limited in accordance with the availability of space and staff.

b. The Chief Administrative officer may limit the number of persons allowed per visit in accordance with considerations of space, time and security.

c. Visiting privileges may be temporarily suspended by the Chief Administrative officer during an institutional emergency or lockdown and for a reasonable time thereafter, upon the approval of the Director.

d. Visitors and committed persons shall not be permitted to exchange any item during a visit, except with prior approval of the Chief Administrative officer or his designee.

e. The Chief Administrative officer or his designee may deny, suspend or restrict visiting privileges based, among other matters, upon the following:

(1) Security and safety requirements;

(2) Space availability;

(3) Disruptive conduct of the committed person or visitor;

(4) Abuse of the visiting privileges by the committed person or visitor; or

(5) Violation of State or Federal laws or departmental rules by the committed person or visitor.

f. Any of the following actions on the part of a visitor may result in a temporary restriction of up to six (6) months:

(1) Disruptive conduct of a minor nature.

(2) Disobeying an order or posted rule.

(3) Refusal to submit to search.

(4) Possession of drugs when the visitor has demonstrated there was no

intent to conceal and/or introduce drugs into the facility.

(5) Possession of alcohol when the visitor has demonstrated there was no intent to conceal and/or introduce alcohol into the facility.

(6) Being under the influence of alcohol or drugs.

(7) Possession of other contraband as defined under State, Federal or local laws or other departmental rules not specifically outlined in this Warden's Bulletin.

g. Any of the following actions on the part of a visitor may result in a permanent restriction:

(1) Assaultive behavior on any individual.

(2) Sexual misconduct.

(3) Possession of weapons.

(4) Possession of drugs or drug paraphernalia unless the visitor

demonstrates he did not intend to conceal and/or introduce drugs or drug paraphernalia into the facility.

(5) Unauthorized possession of money.

(6) Possession of escape paraphernalia.

(7) Possession of alcohol unless the visitor demonstrates he did not intend to conceal and/or introduce alcohol into the facility.

(s) Providing false identification or information.

(9) Disruptive conduct of a major nature.

(10) Violation of State, Federal or local law during a visit, including arrest and/or conviction based on any action committed during a visit.

(11) Any recurrence of an action that previously resulted in a temporary Restriction.

h. An employee who has been involved with a committed person or a former employee who has either resigned or has been terminated as a result of involvement with a committed person, may be permanently restricted from visiting if it is determined he/she may be a threat to safety or security.

i. If contraband is discovered in the possession of a committed person either during or after a visit, it will be assumed that the contraband- was introduced by the committed person's visitor.

j. Visits of committed persons hospitalized in the community may be restricted to the immediate family and shall be subject to the general visiting policies of the hospital.

k. Written notification of temporary or permanent restriction of visiting privileges shall be sent to the visitor and to the committed person. Any person excluded from a committed person's visiting list at one correctional facility may be excluded at all facilities. The notice of temporary restriction shall state the exact length of the restriction. The notice of permanent restriction shall inform the visitor that he may request that the Chief Administrative officer review the decision after a six (6) month period.

l. Permanent restrictions shall be reviewed by the Chief Administrative officer or his designee on an annual basis upon request of the committed person or his visitor. Written notification of the decision shall be sent to the visitor and to the committed person.

m. The Chief Administrative officer may restore visiting privileges at any time.

7. Exchange of Personal Property During Visit

a. Visitors and inmates shall not be permitted to exchange any item during a visit, except with prior approval of the Chief Administrative officer or his designee.

b. The following items have been tentatively approved to be left at the Gatehouse by visitors and may be forwarded to the inmate if receiving final approval after inspection by the Personal Property Office:

Books - Not to exceed 5

Magazines Not to exceed 10

Newspapers Not to exceed 5

Photographs Not to exceed 12

NOTE: Each item must be identified with the institutional name and number of the

inmate.

(1) Personal property items left at the Hardin County Work Camp must have prior approval of the Chief of Security.

c. Cigarettes and other tobacco products may not be left by visitors, or taken in to the Visitation Room. Cigarette machines are available in the visitation area.

(1) Visitors may leave one unopened package of cigarettes or other tobacco products at the Hardin County Work Camp for the inmate.

e. Items not approved in b (above) will be returned to the visitor upon termination of the visit.

f. Inmates wishing to have personal property items given to their visits to take out, must contact the Personal

Property Office for prior approval for same.

Visitor Registration and Entrance to Facility

a. Visitors must sign in and out at the Gatehouse at the Shawnee Correctional Center and at the Administration Building at the Hardin County Work Camp.

(1) All visitors and property are subject to search before, during or following a visit. Vehicles may be searched upon entering the institutional grounds.

(2) Refusal to submit to a search will result In suspension and/or restriction of visiting privileges.

(3) First time visitors to the Shawnee Correctional Center or the Hardin County Work Camp shall be required to complete a "Visiting Questionnaire" prior to being permitted access to the institution.

b. Visitors will be permitted to visit more than one (1) individual inmate providing that the visiting sessions are separate. JOINT VISITS may be approved in these instances:

(1) When a visitor is related to more than one (1) inmate, the Chief Administrative officer may approve a joint visit.

(2) Joint visits, unless a family relationship is documented, are not allowed. Prior arrangements for joint visits between two or more inmates and family of these inmates will be requested in writing and must have the approval of the Chief Administrative officer.

(3) Exceptions may be made in the case of clergy when approved by the Shift Commander.

9. Additional Requirements

a. All rules and regulations pertaining to visiting are posted in the

visiting area and are available to visitors and committed persons.

b. It is expected that both inmates and visitors maintain proper decorum during visiting, Including limited physical contact, to be monitored by appropriate security staff.

(1) Both inmates and visitors shall be appropriately attired during visits, including footwear. Decisions regarding appropriate attire shall be at the discretion of the Shift Commander.

(2) Proper control shall be maintained over children during visits. 4 Visits may be terminated, either temporarily or permanently, if children disturb other visit or move around uncontrolled in the institution.

C. Cameras will not be allowed in the

institution during visits with inmates. Family or friends who have brought a camera must leave it at the Gatehouse. When they wish to have a picture of an inmate, they must arrange with the Visitation Room Officers to purchase photo coupons at the employee commissary. At that time, permission may be granted and arrangements made for pictures to be taken prior to the visitor leaving the institution.

(1) Prior arrangements may be made for visitors to take photographs at the Hardin County Work Camp upon the conclusion of their visit. Appropriate supervision shall be provided.

d. Inmate and inmate visitors may not visit between tables with inmates and visitors sitting nearby.

e. Visitors arriving at the institution with animals or pets in their vehicles shall not be allowed to

enter the institution.

f. Visitors shall remain at the institution once the visit has started and not be allowed to leave the institution and return to the institution all on the same day. Exceptions, in the case of emergencies, may be approved by the Shift Commander.

9. Visitors cannot take more than $20.00 into the Visiting Room.

(1) Visitors to the Hardin County Work Camp are encouraged to limit their possession of currency to no more than $20.00; however, lockers are not available for any type of storage.

10. Special Visits

a. Clergy Visitation

Clergymen from recognized religious groups may visit any committed person during regularly scheduled visiting hours and during other hours as approved by the Chief Administrative officer or his

designee. Visits shall be on an Individual basis only.

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September 1, 1990

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b. Attorney Visitation

(1) Licensed attorneys and any investigators, law students or paralegals working under their supervision may visit a committed person during regularly scheduled visiting hours unless permission has been granted by the Chief Administrative Officer or his designee to visit during other hours.

(2) Investigators, law students or paralegals shall be required to present a written statement from a registered attorney indicating that they are working under the supervision of an attorney and indicating the names,of the committed persons with whom they are authorized to visit.

(3) Attorneys or those working under their supervision are requested to notify the Chief Administrative Officer or his designee of the designated time and date of the visit at least two (2) days in advance of the visit in order to make special visiting room arrangements.

C. Community Hospital Visits (Critical only)

Visits from immediate family members shall be permitted for critically ill inmates only during regular hospital visiting hours and when the patient's condition warrants Such visits; subject to the general visiting policies of the hospital. SPecific prior approval must be obtained from the Duty Administrative Officer before a hospital visit is permitted.

(1) Visitors may not bring food, money or personal property items to the inmate. All such transactions must be handled

through the Gatehouse at the Center and under the guidelines above.

(2) Visits may not bring mail or card nor may they take out correspondence. Both incoming and outgoing letters Shall be sent to the Center for processing in the inmate mailroom.

(3) The assigned officer shall be present in the room at all times during the visit.

(4) The same guidelines for conduct shall be followed as outlined above.

d. Health Care Unit Visits

(1) Inmates admitted to the Shawnee Correctional Center's Health Care Unit may receive visits if their condition warrants.

(a) Visits will be conducted between 9:00 A.M. and 6:00 P.M.

(b) A limit of one adult inmate visitor at a time shall be enforced with the exception of two visitors of the

immediate family.

(c) There shall be a 45 minute time limit on each visit. Extended visits may be approved based on the inmates condition and activity within the Medical Unit.

(d) Requests to visit shall be directed to the Administration Building Sergeant who will contact the Health Care Unit Personnel for approval, and arrangements with the Medical Unit Sergeants.

(e) Visits for inmates in the Health Care Unit shall be conducted in a secure area as designated by the Health Care Personnel at the time of the visit.

e. Segregation Unit Visits

(1) Approval for outside visits to inmates confined in the Segregation Unit

must be given by the Shift Commander.

(a) Visiting hours for Segregation inmates shall be 9:00 A.M. to 3:00 P.M.

(b) The number of visitors will not exceed four (4) persons not including children and may be limited to a lesser number if necessary for security reasons.

(c) These visits will be conducted in the Visitation Room of the Administration Building in proper restraints.

(d) For inmates who show violent or aggressive behavioral visits will be conducted in the Administration Building in an interview room adjacent to the Visitation Area and shall be directly supervised by security staff members.

(e) Visits for inmates who display an immediate threat to the safety or security of the institution may be curtailed or prohibited as warranted by the inmate's behavior.

f. Extended Visits

Inmate visits may be extended beyond the normal visiting hours and days with the prior approval of the Chief Administrative officer or the Duty Administrative Officer. These extended visits may be allowed for inmates In "A" grade with no major disciplinary problems and may normally be granted upon request due to the distance visitors travel, rarity of the visit, special family circumstances and/or other mitigating factors. Extended visits shall be held in the Visiting Room or in another area of the facility as designated by the Shift Commander based upon institutional needs.

9. Any deviations from the above procedures shall require written authorization from the Chief Administrative Officer.

ALL INMATES

(SIGNED)

David G. Sandahl, Warden

Shawnee Correctional Center

DGS:KC:pll

cc: A/W operations For Distribution to Housing Units A/W Programs - For Distribution to Inmate Library Administrative Assistant

File

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 90-3764

JOHN C. JUSTICE and

STEVEN T. LYNCH,

Plaintiffs,

VS.

LT. JERRY SUITS,

PFC. D.R. FRIEDMAN,

DAVID G. SANDAHL,

MICHAEL P. LANE,

KENNETH L. McGINNIS,

GARY RICH, and

UNKNOWN EMPLOYEES OF THE

SHAWNEE CORRECTIONAL CENTER,

Defendants.

REPORT AND RECOMMENDATION

This Report and Recommendation is respectfully submitted to Judge William L. Beatty pursuant to 28 U.S.C. I 636(b)(1)(B).

Plaintiffs, an inmate residing at

the Shawnee Correctional Center, and his friend from Chicago who is in the free world, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 November 19, 1990.

Before the Court is defendants' Motion to Dismiss Plaintiff's Amended Complaint, filed with supporting memorandum on April 1, 1991, pursuant to Fed. R. Civ. P. 12(b)(6). A hearing was held on this motion on May 17, 1991.

Plaintiffs' Complaint was not prepared by counsel. It is well established that pro se complaints, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no facts in support of his claim. Estella v. Gamble, 429 U.S. 97,

106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). Furthermore, the allegations made in such complaints are generally accepted as true for the purposes of a motion to dismiss. Cruz v. Beto, 405 U.S. 319, 322 (1972). In considering a motion to dismiss, the court, after examining the pleadings, must determine only whether the plaintiff should be allowed to present evidence on his claims. Mescall v. Burrus, 603 F.2d 1266, 1268 (7th Cir. 1979). The instant Complaint must therefore be construed liberally.

Plaintiffs have filed a thirteen count Complaint against the defendants alleging various constitutional violations based upon their misunderstanding of their constitutional rights. All thirteen counts of this complaint stem from plaintiff Justice's obdurate refusal to recognize the right

of prison authorities to search visitor's vehicles upon their entering prison property or the plaintiff's attempt to circumvent those rules.

The facts are as follows;

The plaintiff, John Justice, has been a friend of plaintiff Steven Lynch since before Lynch's incarceration. Subsequent to Mr. Lynch's imprisonment, plaintiff John Justice continued their friendship and initiated a series of visitations at the various institutions where plaintiff Lynch was held. In late May or June,

1989, plaintiff Justice went to the Shawnee Correctional Center to attend a picnic for the benefit of inmates to which family and friends were invited. Upon arrival at the Shawnee Correctional Center, plaintiff Justice's vehicle was subjected to a search, outside of the

actual institution, but on the prison grounds itself. (Plaintiff Justice characterizes the area where the search took place as public property). Plaintiff Justice objected to this search, alleging that it was warrantless and a violation of the Fourth Amendment, but allowed the unknown correctional employee to conduct it. Upon conclusion of the search, plaintiff Justice was allowed to enter the institution for the picnic.

The next incident complained of occurred May 13, 1990. At that time, plaintiff Justice and Hans Lynch, plaintiff Lynch's son, came to the Shawnee Correctional Center for a visitation. while signing in, correctional officers requested permission of plaintiff Justice to search his vehicle. Permission to conduct the search was denied and plaintiff Justice

was required to speak with the supervisor on duty. During the conversation with the supervisor, plaintiff Justice was informed that the vehicle had to be searched or the visit would be terminated. In response, plaintiff Justice said, "[y]ou can search the car, but it's against my will and over my objection, without probable cause, and in violation of the Fourth Amendment to the United States Constitution and Article I Section 6 of the Illinois Constitution."

The next incident occurred on June 16, 1990, at the Shawnee Correctional Center, during the annual picnic for inmates, family and friends. At this time, plaintiff Justice attempted to circumvent the requirement that he allow his car to be searched by parking it approximately ¼ mile from the Shawnee Correctional Center

and walking to the facility. Plaintiff Justice was ultimately met by Assistant Warden Judson Childs who refused to let the plaintiff onto the property unless he arrived by car and submitted to a search. A verbal exchange occurred between the plaintiff, Warden Childs and others during which time defendant, Pfc. D.R. Friedman of the Highway Patrol, arrived. After receiving information regarding the incident, defendant Friedman informed plaintiff Justice that "(y]ou either let them search your car, or you get off the property." After refusing to comply with the search, being warned that he would be arrested if he did not leave the property, plaintiff left the area.

Subsequent to these incidents which involved refusing correctional officers permission to search his vehicle, plaintiff Justice on July 18, 1990,

received a letter which informed him that he had been placed on the permanent restriction list for visiting institutions under the control of the Illinois Department of Corrections, including the Shawnee Correctional Center. Plaintiffs now file a thirteen count Complaint seeking a declaratory judgment, injunctive relief as well as compensatory and punitive damages.

As noted by the Court, the plaintiffs have filed a thirteen count Complaint which, for each count, names either a purported constitutional right or a different defendant. In rendering a decision on this motion, the Court will address various principles instead of the various counts.

A. RIGHT OF PERSON LIVING IN THE FREE WORLD TO VISIT A PERSON INCARCERATED IN A CORRECTIONAL FACILITY

The right of due process arises only when

a protected interest is at stake. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). It is well established that a convicted prisoner has no constitutional right to visitation and that limitations upon visitation are warranted when it is necessary to meet legitimate penological objectives. Alabama V. Pugh, 438 U.S. 781 (1978); Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980). The privilege of visitation is subject to the discretion of prison authorities, provided the visitation policies of the prison meet penological objectives. Evans v. Johnson, 808 F.2d 1427, 1428 (11th Cir. 1987). The Illinois Department of Corrections Rules are found at 20 Ill. Adm. 525.60(f) and state in pertinent part:

(f) Any of the following actions on the part of a visitor may result in a temporary restriction of up to six

months:

1) Disruptive conduct of a minor nature;

2) Disobeying an order or posted rule;

3) Refusal to submit to search;

4) Possession of drugs when the visitor has demonstrated there was no intent to conceal and/or introduce drugs into the facility;

5) Possession of alcohol when the visitor has demonstrated there was no intent to conceal and/or introduce alcohol into the facility;

6) Being under the influence of alcohol or drugs;

7) Possession of other contraband as defined under federal or local laws or other Departmental rules not specifically outlined in this Subpart.

(Emphasis added). Finally, the Seventh Circuit Court of Appeals has recently ruled that there is no right for a free person to visit an incarcerated person.

Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989). In rendering this decision, the Court of Appeals referred to language in Ill. Rev. Stat. oh. 38, para. 1003-7-2 (1989) Which states, "[a]ll of the institutions and facilities of the Department shall permit every incarcerated person to receive visitors." The Mayo court stated that at most the language creates a right to receive visitors, not a right to visit. See also United States ex rel. Adams v. O'Leary, 659 F. Supp. 736 (N.D. Ill. 1987) (emphasis added).

In the instant case, plaintiffs have brought a multi-count Complaint which alleges various violations of their constitutional rights which arose as the result of plaintiff John C. Justice being denied access to the Shawnee Correctional Center for the purpose of visiting plaintiff Steven Lynch. As the case law

amply indicates, mr. justice has no constitutional right to visit Lynch in the prison. As plaintiff Justice is not entitled to enter the prison, he must abide by the rules set by the Illinois Department of corrections relating to visitation. That Mr. Justice, or even the Court, might find the rules to be overbroad, does not alleviate the requirement that Mr. Justice follow them.

B. CLAIMS OF RETALIATION

The Supreme Court has recognized that inmates have a right to be free from the arbitrary actions of prison officials. See Wolff v. McDonnell, 418 U.S. 539 (1974). The Seventh Circuit has further stated that, 11[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper. Matzker v. Herr, 748

F.2d 1142, 1150 (7th Cir. 1984), citing, Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978), cert. denied, 440 U.S. 916 (1979).

The Seventh Circuit has made clear that bare conclusory allegations of retaliation are not enough to state a claim for relief under 1 1983. Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985); Vega v. DeRobertis, 598 F. Supp. 501, 506-7 (N.D. Ill. 1984), aff'd without published opinion, 774 F.2d 1167 (7th Cir. 1985). At a minimum, a plaintiff must set forth "a chronology of events from which retaliatory animus on the part of defendants could arguably be inferred." Cain v. Lane, 851 F.2d 1139, 1143 n.6 (7th Cir. 1988). However, even if the plaintiff alleges a chronology of events from which retaliatory animus can be inferred, dismissal is appropriate if there is no factual support for the

allegations or the factual support is contradicted by facts that a court has notice of or that are apparent in the record. See Rizzo v. Dawson, 778 F.2d 527, 532 n.4 (9th Cir. 1985).

Assuming the facts as stated by the plaintiffs are true, they have failed to allege a constitutional violation. As previously stated, plaintiff Justice has no constitutional right to enter the Shawnee Correctional center to visit an inmate. As plaintiff admittedly refused to comply with a search of his vehicle as required, any action taken against him was not arbitrary and was not in retaliation for the exercise of a constitutional right.

C. DUE PROCESS CLAIM

The right of due process arises only when a protected interest is at stake. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). In other

words, before a person is entitled to the protection of due process, a life, liberty or property interest must be identified. See Shango v. Jurich, 681 F. 2d 1091, 1097 (7th Cir. 1982). It is well established that a convicted prisoner has no constitutional right to visitation and that limitations upon visitation are warranted when it is necessary to meet legitimate penological objectives. Alabama v. Pugh, 438 U.S. 781 (1978); Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980). The privilege of visitation is subject to the discretion of prison authorities, provided the visitation policies of the prison meet penological objectives. Evans v. Johnson, 808 F.2d 1427, 1428 (11th Cir. 1987). Finally, as set forth by the Seventh Circuit Court of Appeals, there is no constitutional right to visit an incarcerated person. Mayo v. Lane, 867

F.2d 374 (7th Cir. 1989).

In the instant case, the plaintiffs have attempted to assert due process claims against the various defendants for the denial of visitation. These claims must fail due to two distinct reasons. In a due process analysis, the Court must first determine which life, liberty or property interest is to be protected. Plaintiff Justice, on whose behalf most of these claims are filed, has no constitutional right to visit plaintiff Lynch at the Shawnee Correctional Center. Therefore, the defendants are entitled to set preconditions which govern the admittance of plaintiff Justice to the institution.

Plaintiff Lynch's case is even weaker. Lynch's sole claim is that plaintiff Justice was not allowed to visit him. This claim must fail. Chapter 38 of the Illinois Revised

Statutes, paragraph 1003-7-2(f) provides that "[a]ll of the institutions and facilities of the Department [of Corrections) shall permit every incarcerated person to receive visitors." The Mayo court stated that at most, this language created a right to receive visitors, not a right to visit. United States ex rel. Adams v. O'Leary, 659 F. Supp. 736 (N.D.Ill. 1987) (emphasis added) . Plaintiff Lynch has not been denied the right to receive visitors; only the right to receive a specific visitor (John Justice) due to his failure to conform to departmental rules.

D. CRUEL AND UNUSUAL PUNISHMENT

The standard for determining what is cruel and unusual punishment was enunciated in Gregg v. Georgia, 428 U.S. 153 (1976). In that case the Court held that the Eighth Amendment protection against cruel and unusual punishment

requires that there be neither "unnecessary and wanton infliction of pain," nor punishment "grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173 (1976). "Wanton infliction of pain or intentional or knowing conduct requires a level of culpability greater than mere negligence." Risner v. Duckworth, 562 F. Supp. 378, 381 (1983). "Thus, deliberate indifference to the deprivation of an inmate's rights is actionable where it can be shown that the prison authorities manifested an actual intent to deprive him of his rights. . ." Burr v. Duckworth, 547 F. Supp. 192, 196 (1982). The Supreme Court has on numerous occasions held that an inmate's treatment by prison authorities is rarely subject to judicial oversight under the Due Process Clause. Vitek v. Jones, 445 U.S. 480 (1980). This result is

necessitated by the fact that prison officials have broad administrative and discretionary authority over the institutions they manage and that prisoners retain only a narrow range of protected liberty interests. Hewitt v. Helms, 459 U.S. 460 (1983). The Eighth Amendment prohibits punishments which involve the unnecessary and wanton infliction of pain, are grossly disproportionate to the severity of the crime for which an inmate was imprisoned or are totally without penological justification. Rhodes v. Chapman, 452 U.S. 337 (1981); Caldwell v. Miller, 790 F.2d 589, 600 (7th Cir. 1986). Conditions of confinement being part of the penalty fall within the ambit of the Eighth Amendment. Whitley v. Albers, 475 U.S. 312 (1986). The Supreme Court has provided no static test for determining whether the particular conditions of

confinement constitute cruel and unusual punishment. Instead it has directed that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Rhodes v.Chapman, 452 U.S. 337, 346 (1981) ; (quoting Trop v. Dulles, 356 U.S. 86 (1958)). In determining whether there has been an Eighth Amendment violation the Court must focus on the totality of the conditions of confinement. Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981). The Supreme Court has cautioned, however, that conditions are not unconstitutional simply because they are harsh and restrictive. Such conditions are part of the penalty that criminal offenders pay for their offenses against society. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

Plaintiff Lynch, in his Complaint, alleges that he has been subjected to

cruel and unusual punishment by defendants refusal to allow plaintiff John C. Justice to enter the prison for visitation. It is however, unquestioned that prisoners enjoy no absolute constitutional right to visitation. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd in part sub. nom. Alabama v. Pugh, 438 U.S. 781 (1978). Or, as the Supreme Court stated in Jones v. North Carolina Prisoner's Union, 433 U.S. 119, 126 (1977), the "concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution." Therefore, denial of visitation does not constitute cruel and unusual punishment. See Bellamy v. Bradley, 729 F.2d 416 (6th Cir.), cert. denied, 469 U.S. 845 (1984).

Accordingly, for the above-stated reasons, it is the recommendation of this Court that the defendants' Motion to Dismiss be granted as to all counts and defendants.

Dated this 23rd day of May, 1991.

(SIGNED)

GERALD B. COHN

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR

THE SOUTHERN DISTRICT OF ILLINOIS

No. 90-3764

JOHN C. JUSTICE,

AND

STEVEN T. LYNCH,

Plaintiffs

vs.

Lt. JERRY SUITS, et al.,

Defendants

OBJECTIONS

TO THE REPORT AND RECOMMENDATIONS

NOW COME THE PLAINTIFFS, in propriae personae, and object to Magistrate Gerald B. Cohn's Report and Recommendation filed on May 23, 1991, following the hearing on the Defendants' Motion to Dismiss held on May 17, 1991, as follows:

1. The Magistrate misapprehends the situation complained of:

a. The first incident

complained of, discussed in the Report and Recommendation in the paragraph concluding on the top of page three, ends by saying, "Upon conclusion of the search, plaintiff Justice was allowed to enter the institution for the picnic."

This is not what happened.

Plaintiff Justice, following the unreasonable search of his vehicle, entered the confines of the prison, was given a thorough body search, and following <u>that</u> search, to which he did not and has not objected, he was allowed to enter the visiting area for the picnic. Visitors do not lose <u>all</u> of their Fourth Amendment rights at the prison gates. <u>Hunter v. Auger</u>, 672 F.2d 668, 674 (8th Cir. 1982).

b. The next incident complained of on May 13, 1990, is described in the second paragraph on page three. It does not mention that following the unreasonable search of the vehicle, both Plaintiff Justice and Lynch's son were given thorough body searches upon entering the prison, prior to the visit.

c. The third incident, pages three to four in the Report and Recommendation, leaves out the crucial situation, forced by Defendant Suits, who disdained Plaintiff Justice's objection to the unreasonable search with the assertion that, "The Constitution's got nothing to do with it: we're demanding that you give us your permission to search your

car." Had this gauntlet not been thrown in the face of Plaintiff Justice, all parties would have been spared much time and effort.

Plaintiff Justice has fallen for a casuistic trap of the "Have-you-stopped-beating-your-wife" variety: on page 10, line 26 and page 15, line 7 of the Response to Defendants' Motion to Dismiss Amended Complaint, Plaintiff Justice wrote that he "has not refused 'a search'; he refused an unreasonable search that would have preceded a search." Nowhere in the recitation of facts in the Amended Complaint did Plaintiff Justice state that he refused a search; on the contrary, he said that he objected to the search on

Constitutional grounds as set forth in the Amended Complaint on page 8, paragraphs 14 through 24. The Defendants' counsel has alleged falsely that Justice refused a search contrary to the form of 20 Ill. Adm. 525.60(f)(3). This did not occur and Plaintiff Justice rescinds all statements to that effect subsequent to the filing of the Amended Complaint. The correct and truthful response to the allegations of the Attorney General at Count Ten of the Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Amended Complaint that

> "Even if co-plaintiff Justice were the only person on earth willing to visit

plaintiff Lynch, defendants would not be required to allow visitation if Justice refused to be searched."

was as follows on page 22, line 1 of the Response,

"Plaintiff Justice has not refused to be searched; he has objected to an unreasonable search outside the confines of the prison, which had no relationship to the security of the prison, because each and every visitor <u>is</u> body-searched after entering the confines of the prison."

d. The next to last paragraph of page four in the Report and Recommendation recites that a letter was written to Plaintiff Justice by Defendant Sandahl,

placing him on a permanent restriction list. This was done because Justice had asserted a Constitutional right. "Any act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) quoted in Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978) See also Matzker v. Herr 748 F.2d 1142, 1150-51 (7th Cir. 1984) This was done, we repeat, because Justice had asserted a Constitutional right: the first incident to which Defendant Sandahl's letter refers occurred on May 13, 1990, at which time

Justice asserted a Constitutionally based objection--although the Amended Complaint does not recite it, Justice asked what probable cause the prison staff members had for searching his vehicle, and received no answer--and the vehicle was searched over his objection. The letter, Exhibit A appended to the Response to Defendants' Motion to Dismiss Amended Complaint, states that Justice "refused permission for staff to search your vehicle on May 13, 1990, and June 16, 1990." The allegation reveals a mental bias on the part of prison supervisory staff which regards acknowledged Constitutional rights as impediments to their will. By this bias, formulated to perfection by Defendant Suits,

"The Constitution's got nothing to do with it: we're demanding that you give us your permission to search your car." Thus, one cannot even be searched over objection, and the four visitors recounted in Defendant Rich's testimony[1] in open court on December 21, 1990, have submitted to a consensual search and the contraband found is evidence to which they cannot object. They were entrapped by their desire to see their relatives or friends, by a malicious prison staff and Illinois Department of Corrections, who know that one percent of the happy people who come to their picnic can have their anticipation turned to

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[1] Transcript ordered; never received nor filed with the Clerk so far as is known.

misery for the staff's delectation.

The assertion of a Constitutional right cannot be converted into a crime, but apparently it can be used to deny privileges to those who have sufficient awareness of their rights to assert them as though they really had validity.

e. The allegations of the Report and Recommendation on page four of the Report and Recommendation are difficult to reconcile with the facts. Line two alleges that there is a requirement that a car be allowed to be searched as a condition precedent to a visit. This is not the case; searches of visitors' vehicles did not begin, to Plaintiff Justice's knowledge,

until 1989. There must be some reasonable basis for invasion of privacy, the minimal vestige of the right protected under the Fourth Amendment, secured explicitly under Article I, Section 6 of the Illinois Constitution of 1970.

> "An investigatory search will be found constitutionally permissible only when supported by reasonable suspicion directed to the person to be searched..." U.S. v. Clay, 640 F.2d 157, 160 (8th Cir. 1981)

It is patently reasonable that all visitors entering the confines of a prison be searched to determine whether they are carrying on their persons material that would jeopardize

the security of the prison. But the searches complained of took place outside the prison gates.

"[8] Correctional facility security considerations reduce the scope of reasonable expectations of privacy that one normally holds and makes reasonable some intrusions that would not be reasonable outside the facility. However, security considerations do not cause prisoners to lose all of their constitutional rights at the prison gates. Bell v. Wolfish, 411 U.S. 520, 558-59 (1979); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Visitors

> do not lose all of their Fourth Amendment rights at the prison gates. Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982). And prison employees do not lose all of their Fourth Amendment rights at the prison gates. Armstrong v. New York State Commissioner of Correction, 545 F.Supp. 728, 730 (N.D.N.Y. 1982)." (Emphasis in the original.) McDonell v. Hunter, 612 F.Supp. 1122, 1128 (D.C.Iowa 1985)

The Plaintiffs assert that visitors have all of their Fourth Amendment rights outside the prison gates.

Plaintiff Justice did not, as

alleged throughout page four of the Report and Recommendation, refuse permission to search his vehicle: he objected that the proposed search was in violation of the Fourth Amendment and Article I, Section 6 of the Illinois Constitution (which is more encompassing than the Fourth Amendment.)

2. A. RIGHT OF PERSON LIVING IN THE FREE WORLD TO VISIT A PERSON INCARCERATED IN A CORRECTIONAL FACILITY.

The Plaintiffs made it clear throughout their Amended Complaint that this is <u>not</u> a visitation issue. The only issues the Plaintiffs seek to litigate are those resulting from the alleged unreasonable searches, retaliation for having asserted a constitutional right, deprivation of rights without due process, and cruel

and unusual punishment.

It may be noted that although the Seventh Circuit has declared in Elizabeth Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989), that there is no constitutional right of a free person to visit one who is incarcerated, the right to visit was held to be protected by the First Amendment in McMurry v. Phelps, 533 F.Supp. 742, 764 (W.D. La. 1982); the right to visit was held to be protected based on unspecified constitutional grounds in Lynott v. Henderson, 610 F.2d 340, 342-43 (5th Cir. 1980); and unreasonable visiting restrictions were held to violate the Eighth Amendment in Laaman v. Helgemoe, 437 F.Supp. 269 (D.N.H. 1977) and Hardwick v. Ault, 437 F.Supp. 116, 131 (M.D.Ga. 1978).

The Magistrate asserts that

Plaintiff Justice "must abide by the rules set by the Illinois Department of Corrections relating to visitation." In fact, Plaintiff Justice did abide by the rules: he did not refuse a search, he objected to its Constitutional validity. If the Department of Corrections demanded that every visitor be publicly strip-searched with a body-cavity examination when the centerline of Highway 146E was crossed at Shawnee Correctional Center, the "rule" might stir more vigorous objection on the part of the mass of visitors, but it would be little more repugnant to the Fourth Amendment and might serve a legitimate penological objective.

B. CLAIMS OF RETALIATION

Plaintiff Justice did not refuse a search. His vehicle had been

searched over his objection on two prior occasions. When he objected on June 16, 1990, the mechanism was set up to exclude visitors who would not waive their Fourth Amendment rights. The Illinois Department of Corrections cannot make conditions precedent to visitations which strip visitors of their Constitutional rights. The Defendants in sequence were aware of Justice's assertion of an objection under the Fourth Amendment and under the broader right secured in the Illinois Constitution. Defendant Suits had demanded that Justice waive those rights or get off prison property. Each and every one of the Defendants supported Defendant Suits in that demand and retaliated by demanding that Justice leave the premises for having asserted a Constitutional right.

Then Defendant Sandahl retaliated by placing Justice on the Permanent Restriction List for visiting as "a result of your second violation of Departmental Rules in that you refused permission for staff to search your vehicle on May 13, 1990 and on June 16, 1990." This is despite the provable fact that the vehicle was searched, over objection, on May 13, and that no one can compel a citizen to waive rights secured under the Constitution.

Whatever factual support the parties have for their allegations must be argued to a jury. The facts that the Court may have notice of or that are apparent in the record must be decided by a jury, as demanded by the Plaintiffs.

As stated above in 1.c. at paragraph two, Justice rescinds the

prior statements that he refused an unreasonable search; the Amended Complaint nowhere alleges that there was a refusal of a search, and there was none.

C. DUE PROCESS CLAIM

The Magistrate says that, "It is well established that a convicted prisoner has no constitutional right to visitation and that limitations upon visitation are warranted when it is necessary to meet legitimate penological objectives."

Plaintiff Lynch has a liberty interest created by the Illinois General Assembly at Ill. Rev. Stat. Ch. 38, par. 1003-7-2(f) to receive visitors. This liberty interest is protected under the Due Process Clause of the Fourteenth Amendment.

> "[A]n individual claiming a protected interest must have a

legitimate claim of entitlement to it. Protected liberty interests may arise from two sources--the Due Process Clause itself and the laws of the States.' Hewitt v. Helms, 459 US, at 466" Ky. Dept of Corrections v. Thompson, 490 U.S. _____, 104 L.Ed.2d 506 at 514 (1989)

Plaintiff Justice has met all the preconditions governing the admittance of visitors to the institution as evidenced by his numerous visits over a period of years to Plaintiff Lynch. He has always submitted to a body search within the confines of the prison. The Defendants are not entitled to set preconditions governing the admittance of Plaintiff Justice which compel him to waive his Constitutional rights, particularly

where those conditions are unreasonable and concern property which remains outside the confines of the prison. Visitors to a prison have the right secured under Article I, Section 6 of the Illinois Constitution of 1970 to "...be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy...." At the point of entering prison grounds, they are not "drivers" who have lost their right to travel by accepting a license from the State and hence are subject to administrative stops, searches, and seizures upon the highways. They are citizens who have all their rights secured, and cannot be compelled to waive those rights.

Plaintiff Lynch has been denied the right to receive a specific visitor

because of that visitor's objection on Constitutional grounds to an unreasonable search; that visitor did not fail to conform to departmental rules--he did not refuse a search, he objected to the search as he had a right to.

D. **CRUEL AND UNUSUAL PUNISHMENT**

The Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) Because the only visitors that Plaintiff Lynch has had over a period of years are Justice or those that Justice has brought to visit with him, including his last visitor who visited Lynch without Justice, denial of visitation to Justice is cruel and unusual punishment for Lynch. Although Lynch may have no

Constitutional right to visitation, the Illinois General Assembly has seen fit to provide for that right by statute at Ill. Rev. Stat. Ch. 38, par. 1003-7-2(f) to preclude arbitrary and malicious deprivation of visitation by prison staff. Whether cruel and unusual punishment has been inflicted rests on facts to be determined by a jury.

WHEREFORE, the Plaintiffs pray that this Honorable Court deny the recommendations of the Magistrate, and set this cause for discovery and for trial before a jury.

Respectfully submitted, (SIGNED) John C. Justice, 1801 S. 55th Avenue, Cicero, Illinois 60650, 708-656-3250

(SIGNED) Steven T. Lynch N-04276, Box 300, Shawnee Correctional Center Vienna, Illinois 62995, 618-658-8331

VERIFICATION

The undersigned states under penalty of

perjury that the allegations of fact in the Objections to the Report and Recommendation are true to the best of his knowledge and recollection.

(SIGNED)_____

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

NO. 90 3764

JOHN C. JUSTICE AND STEVEN T. LYNCH,

Plaintiffs,

-vs-

LT. JERRY SUITS, PFC D.R. FRIEDMAN, DAVID G. SANDAHL, MICHAEL P. LANE, KENNETH L. MCGINNIS, GARY RICH, and UNKNOWN EMPLOYEES OF THE SHAWNEE CORRECTIONAL CENTER,

Defendants.

ORDER

This matter is before the court on the Magistrate's Report and Recommendation filed May 23, 1991 (Doc. 25). The plaintiffs have filed timely objections, and therefore, the court will make a de novo determination pursuant to 28 U.S.C. § 636(b).

Before the court is the defendants' motion to dismiss plaintiffs' amended

complaint (Doc. 19).

Plaintiffs' amended complaint sets forth a chronology of events which led up to the filing of this lawsuit. Plaintiff Justice is a friend of plaintiff Lynch, and in May or June of 1989, plaintiff Justice went to Shawnee Correctional Center to visit plaintiff Lynch. At that time Justice and his car were searched by correctional officers, over his objection. Then, on May 13, 1990, Justice,,was taking Lynch's son to visit. At that time, Justice again objected to his car being searched, but allowed the search to take place so that Lynch's son could visit with his father. Finally, on June 16, 1990, a picnic was scheduled at Shawnee Correctional Center for inmates and their friends and families. At this time, plaintiff Justice attempted to avoid the search of his car by parking about one-quarter of a mile away and

walking to the facility. As Justice attempted to enter the facility on foot, he was approached by defendant Childs who said that he would not be permitted to walk onto the premises. Justice then returned to his car and drove it into the line of cars approaching the facility. When he reached the check in point, defendant Suits asked to search his car. Justice stated that such a search would be in violation of the Fourth Amendment and the Illinois Constitution. Defendant Childs and defendant Friedman informed Justice that he would have to permit the search or leave the premises. This time, Justice did not submit to the search of his car and left the prison. On June 27, 1990, Justice received a letter informing him that he had been placed on the permanent restriction list for visiting institutions under the control of the Illinois Department of Corrections.

In their thirteen count complaint,, the plaintiffs allege primarily four causes of action: (1) That plaintiff Justice was required to submit to an unreasonable search in violation of the Fourth Amendment and Illinois Constitution; (2) That the search was conducted in retaliation for Justice's assertion of his constitutional right not to searched without probable cause; (3) That the plaintiffs, Justice and Lynch, were deprived of rights without due process; and (4) That plaintiff Lynch has been subjected to cruel and unusual punishment by being denied visits from plaintiff Justice. Plaintiffs seeks declaratory relief and compensatory and punitive damages. They also seek an injunction ordering the defendants to "refrain from searching privately owned vehicles that enter upon the property of the State of Illinois outside the

confines of a correctional center where inmates are not given unsupervised access unless there be reasonable suspicion that a crime has been committed in which a particular vehicle has been implicated."

In his Report and Recommendation, the magistrate conducted a thorough evaluation of the plaintiffs' claims, and found that the defendants' motion to dismiss should be granted as to all counts and all defendants. In their objections, the plaintiffs assert that their amended complaint does not involve a visitation issue. They assert that the only issues they seek to litigate are the unreasonable searches, retaliation for asserting a constitutional right, deprivation of rights without due process, and cruel and unusual punishment.

It appears to the court that the

entire lawsuit is based on plaintiff Justice's mistaken impression that prison visitors should not have to waive their Fourth Amendment rights as a condition to visiting inmates of the Illinois Department of Corrections. Plaintiff Justice also engages in a game of semantics when he insists that he did not violate DOC regulations because he did not refuse a search, he objected to the search.

As the magistrate noted, plaintiff Justice has no constitutional right to visit Lynch in prison. See Mayo v. Lane, 867 F.2d 374 (7th Cir. 1989). Thus, if plaintiff Justice is to enter the prison as a visitor, he must abide by the rules set by the Illinois Department of Corrections relating to visitation. There is no indication that the Illinois Department of Corrections Rules at 20 Ill. Admin. §525.60(f) are

unconstitutional, and in fact, they appear to meet legitimate penalogical objectives of maintaining the security of the institution during visits. See Alabama v. Pugh, 438 U.S. 781 (1978).

Plaintiff Justice has no right to enter an Illinois Department of Correction facility without submitting to a search of his person and his car. Therefore, his claim that the search requirement violates that Fourth Amendment and the Illinois Constitution is wrong. The mere fact that Justice parked his car about a quarter of a mile away from the Correctional Center at the time of the last visit, does not change the situation. The court is not going to second guess the prison officials' decision not to permit visitors to walk onto the premises during a picnic on the grounds.

The plaintiffs' claims of

retaliation are patently wrong. In his objections, plaintiff Justice argues that after he asserted his rights under the Fourth Amendment, he was retaliated against by being required to leave the premises and being placed on the permanent restriction list. As the magistrate noted, even assuming that the facts as stated by the plaintiffs are true, they have failed to allege a constitutional violation. Plaintiff Justice admittedly refused to allow his car to be searched on June 16, 1990, and any action taken against him was not in retaliation for the exercise of a constitutional right, because he had no right to enter the Shawnee Correctional Center without submitting to the search.

Plaintiffs' due process claims must also fail, because plaintiff Justice has no constitutional right to visit plaintiff Lynch at the Shawnee

Correctional Center and plaintiff Lynch has not been denied the right to receive visitors other than Justice who failed to comply with prison regulations.

Finally, the magistrate discusses at length plaintiff Lynch's claim that he has been subjected to cruel and unusual punishment by the defendants' refusal to permit Justice to visit him. For the reasons stated by the magistrate, the court agrees that the denial of visitation in this case does not constitute cruel and unusual punishment.

For all of these reasons, the defendants' motion to dismiss (Doc. 19) is granted as to all counts and all defendants.

IT IS SO ORDERED.

DATED: This 19 day of July, 1991

(SIGNED)

WILLIAM L. BEATTY

UNITED STATES DISTRICT JUDGE

No. 91-3013

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted November 18, 1992*2

November 20, 1992.

Before

Hon.WILLIAM J. BAUER, Chief Judge

Hon.WALTER J. CUMMINGS, Circuit Judge

Hon.THOMAS E. FAIRCHILD,

Senior Circuit Judge

JOHN C. JUSTICE and STEVEN T. LYNCH,

Plaintiffs-Appellants

v.

LIEUTENANT JERRY SUITS, D.R. FREIEDMAN, DAVID G.SANDAHL, et.al.,

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might make a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and the record.

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.

90 C 3764

William L. Beatty, Judge.

O R D E R

John Justice and Steven Lynch sued various officials of the Shawnee correctional Center in Vienna, Illinois, under 42 U.S.C. § 1983. The district court dismissed the suit for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The plaintiffs appeal.

We affirm essentially for the reasons stated in the attached district court order. We note that on appeal the plaintiffs rely on several Eighth Circuit decisions. Of these cases, McDonell v. Hunter, 809 F.2d 1302, 1309 (8th Cir. 1987), most strongly supports plaintiffs'

position. However, McDonell involved searches of

prison employees' vehicles. It fails to undermine our conclusion in Mayo v. Lane, 867 F.2d 374, 376 (7th Cir. 1989), upon which the district court relied, that Illinois law confers upon outside persons no right of visitation. Absent such a right, the defendants' insistence on searching Justice's car, to be upheld, must simply meet legitimate penological objectives. Young v. Lane, 922 F.2d 370, 374 (7th Cir. 1991). Because of the wide-ranging deference to be accorded the decisions of prison administrators, the burden is not on the prison officials to show affirmatively that its policy or action meets these objectives. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977).

We add to the district court's Eighth

Amendment discussion merely by noting that lack of companionship, even if it continues over an extended period of time, does not constitute cruel and unusual punishment. Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980). See also Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir.), cert. denied, 469 U.S. 845 (1984); Jackson v. Meachum, 699 F.2d 578, 581-583 (1st Cir. 1983); Newman v. State of Alabama, 559 F.2d 283, 291 (5th Cir. 1977), rev'd in part sub nom., Alabama v. Pugh, 438 U.S. 781 (1978)(reversing with respect to some defendants on Eleventh Amendment grounds).

AFFIRMED.

1801 S. 55th Avenue

Cicero, Illinois 60650

January 12, 1993

708-656-3250

Warden DAVID G. SANDAHL

Shawnee Correctional Center 618-658-8331

Hwy 146 E

Box 400

Vienna, Illinois 62995

Dear Sir:

Pursuant to the terms set forth in your letter dated June 27, 1990, which stated,

> "Please be advised that you have been placed on the Permanent Restriction List for visiting at the Shawnee Correctional Center as well as all correctional facilities within the Adult Division of the Department of Corrections. This restriction began on June 16, 1990.
>
> "This restriction is a result of your second violation of Departmental Rules in that you refused permission for staff to search your vehicle on May 13, 1990, and June 16, 1990. I am also advising you that you may request review of this restriction

after a six-month period."

I am now requesting review of this restriction, and removal of the State-wide restriction.

Very truly yours,

(SIGNED)

John C. Justice

Copy to Steve Lynch N-04276

1801 S. 55th Avenue

Cicero, Illinois 60650

February 27, 1993

708-656-3250

FAX 656-6049

Warden Linda Dillon

Menard Psychiatric Center

Menard, Illinois 62259

Dear Warden Dillon:

For three years now I have been barred from visiting my friend Steve Lynch, N-04276. The issue I raised at Shawnee Correctional Center is still on appeal. I did not refuse a search, as the staff at Shawnee claim; the uncontroverted evidence is that I objected to a vehicle search that I believe is unconstitutional because it was outside the confines of the prison, was without probable cause, and had no relevance to the security of the prison. Objection to perceived violations of the Constitution is not only a right, it is a duty, if the citizenry are to preserve their liberties. I did not and do not object to the personal search on entering the prison.

If you will restore my visitation privileges, I believe it will be beneficial to my friend's mental health. I believe that the reason he has been consigned to your care is that he was very depressed, in part because he was denied visits. I applied for review of the restriction on January 12, 1993; Warden Sandahl declined to lift the restriction "at this time."

Please lift the ban and allow me to visit my friend.

Very truly yours,
(SIGNED)
John C. Justice

ILLINOIS
DEPARTMENT
OF
CORRECTIONS

Jim Edgar
Governor

Howard A. Peters Ill
Director

Menard Psychiatric Center P.O. Box 56 /
Menard, Illinois 62259
Telephone (618) 826-4593

March 15, 1993

Mr. John C. Justice
1801 South 55th Avenue
Cicero, IL 60650

Dear Mr. Justice:

This letter is in response to your request for restoration of visiting privileges imposed on Steve Lynch N04276 as a result of an incident that occurred at Shawnee Correctional Center.

Please be advised that it is still Department Policy and is within the authority of the Department of Corrections to conduct random searches of visitors and their automobiles. A review

of visiting records reflects that your visiting privileges were also previously restricted for three months at Menard Correctional Center on October 4, 1987. It appears by your letter that you still strongly object to the search procedure within the Department of Corrections. Based on this review, your request is denied and visitation restrictions will remain in effect.

Sincerely yours,

(SIGNED)

Linda A. Dillon

Warden

LAD/DV:jmc

CC to Assistant Warden Yallaly

Master File N04276

No. 92 2859

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 18, 1993

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK,

Circuit Judge

STEVEN LYNCH,

Petitioner-Appellee,

v.

DAVID G. SANDAHL,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 91 C 6730

Marvin E. Aspen, Judge.

At the request of Steven Lynch, the district judge issued a writ of habeas

corpus, directing Illinois to release Lynch if he was not retried within 120 days. The state (through the warden of the prison) has appealed. An identical question is before the Supreme Court in Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992), cert. granted, 113 S. Ct. 52 (1992).

Lynch has changed his mind. His lawyers have filed a "stipulation to dismiss appeal and revoke writ of habeas corpus." They represent: "Lynch is unwavering in his desire that the order granting the writ of habeas corpus be revoked and that all pending challenges to his conviction be terminated. Having communicated with Lynch on several occasions and having discussed this matter with Lynch at length, the attorneys believe that the petitioner-appellee fully understands the nature and consequences of the instant motion

directed by him to be filed." Counsel represents that counsel for the appellant agrees that the appeal may be dismissed and the writ of habeas corpus rescinded.

A plaintiff or petitioner may discontinue the litigation even after winning. "An appeal may be dismissed on motion of the appellant on such terms as may be agreed upon by the parties or fixed by the court." Fed. R. App. P. 42(a); cf. Fed. R. Civ. P. 41(a)(1). The terms on which the parties have agreed are that the writ of habeas corpus be rescinded with prejudice, that each side bear its own costs, and that the appeal Lynch has filed in state court be dismissed with prejudice.

We therefore REMAND this matter to the district court with instructions to dismiss the case under Fed. R. Civ. P. 41(a)(1).